NO. 84-1891

In the Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT J. BRUNO
VERSUS
NEW ORLEANS DEPARTMENT OF POLICE

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether regulation ASOP 75, paragraph 2 of the New Orleans Police Department, as promulgated and applied violates appellants Constitutional rights to vote, to travel, to equal protection of the law, to liberty, to attend the church of his choice, and to due process of the law.

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IN THE SUPREME COURT OF THE UNITED STATES
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Civil Service Commission is not reported. The opinion of the Louisiana Court of Appeal affirming the Civil Service Commission is reported at 451 So.2d 1082. The opinion of the Supreme Court of Louisiana is reported at 462 So.2d 139.

JURISDICTION

The judgement of the Louisiana Surpeme Court denying that the regulations in question of the New Orleans Police Department were constitutional as promulgated and applied was entered on January 14,1985. A motion for rehearing was filed by appellant which was denied on February 21, 1985. The jurisdiction of this Court is invoked

under 28 U.S.C. 1257. *New Orleans Waterworks Co. vs. Louisiana Sugar Refining Co.*, La. 1888, 8 S.Ct. 741, 125 U.S. 18, 31 L.Ed 607; *Huffman vs. Pursue, Ltd., Ohio* 1975, 95 S.Ct. 1200, 420 U.S. 592, 43 L.Ed 2d 482, rehearing denied 93 S.Ct. 1969, 421 U.S. 971, 44 L.Ed 2d 463.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...

The Fourtheenth Amendment, Section 5 to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Regulation ASOP 75, paragraph 2, of the New Orleans Police Department provides:

> A sick leave period commences at the time the member notifies the Desk Officer. A member on sick leave shall remain in his residence or other approved place of Confinement for the entire sick

> leave period, except to visit a physician, hospital, clinic, purchase meals or purchase medicine. The member shall notify his Unit of Assignment before leaving and upon returning from such a visit (exceptions below).

STATEMENT

1. This case involves the question whether certain regulations (as promulgated and applied) of the New Orleans Police Department (ASOP 75), which confine police officers on sick leave to the premises of his "sick leave" place of confinement, are repugnant to the United States Constitution; specifically whether said regulation denies police officers the equal protection of the laws, the right to liberty, the right ot travel, the right to vote, the right to attend a church of his choice, and the right to due process of the law.

The regulation was enacted to maintain morale, to protect the public fisc, and to prevent abuse of sick leave. The regulation in question provides:

> A sick leave period commences at the time the member notifies the Desk Officer. A member on sick leave shall remain in his residence or other approved place of Confinement for the entire sick leave period, except to visit a physician, hospital, clinic, purchase meals or purchase medicine. The member shall notify his Unit of Assignment before leaving and upon returning from such a visit (exceptions below.)

The Constitutional issues were first raised in the instant case on rehearing before Louisiana's Fourth Circuit Court of Appeal, and thereafter by writ to Louisiana's

Supreme Court.

2. The instant suit arose in 1979 when the appointing authority (Chief of Police) of the police department of the City of New Orleans, Louisiana, dismissed from the police force the appellant, police officer Vincent J. Bruno, on the grounds that he violated the sick leave regulation in question by failing to report absences from his place of sick leave confinement. The Civil Service Commission of New Orleans, which is the trial court in such cases, affirmed the dissmissal. The Appellate courts of Louisiana, the Fourth Circuit Court of Appeal and the Louisiana Supreme Court, also affirmed. Neither in the Circuit Court or the Supreme Court were the decisions unanimous.

Previous to his dismissal Officer Bruno served the New Orleans Police Department for thirteen years (only 3 more years necessary for retirement) without a blemish on his record.

At the time Bruno was dismissed, not only was he a veteran police officer, he was also president of the Police Association of New Orleans (PANO).

Bruno's problems began as the result of a police strike he called, which resulted in the cancellation of Mardi Gras in New Orleans. The only other time this had been done was during World War II. The dissenting opinion of Judge James Garrison, 4th Circuit Court of Appeal of Louisiana, best describes the scenario. *Bruno vs. Department of Police*, 451 So.2d 1082, 1088, (La. App. 4th Cir. 1984).

Bruno contends that the regulation in question is unconstitutional as promulgated and in application. Besides

denying Bruno certain fundamental rights, it also denies him and a similar class the equal protection of the laws, since a distinction has been made between police officers on sick leave and police officers on leave due to being injured on duty. *Imborne vs. Department of Police*, 461 So.2d 1095 (La. App. 4th Cir. 1984).

Moreover Bruno contends that his due process rights have been offended by the disproportionate application to him of the punitive aspects of the regulation. Bruno was dismissed while his colleague's were merely suspended for short periods, even though the offenses of all were basically equivalent in seriousness. See: *Peyton vs. New Orleans Police Department*, 451 So.2d 1224 (La.App. 4th Cir. 1984); *Willem vs. New Orleans Police Department*, 368 So.2d 1235 (La. App. 4th Cir. 1979); *Reboul vs. Department of Police*, 420 So.2d 491, (La. App. 4th Cir. 1982); *Daniel vs. Department of Police*, 426 So.2d 282 (La. App. 1983); *Cittadino vs. Department of Police*, 434 So.2d 164, 167 (La. App. 4th Cir. 1983); *Marinovic vs. New Orleans Police Department*, 422 So.2d 226 (La. App. 4th Cir. 1982); *Branifron vs. Department of Police*, 362 So.2d 1221 (La. App. 4th Cir. 1978).

A very similar regulation was held to be unconstitutional in the matter of *Pienta vs. Villege of Schaumburg*, 710 Fed.2d 1258 (7th Cir. 1983), but Louisiana's appellate courts disagreed with the federal appellate court that decided *Pienta*, Id. Moreover, *Pienta*, Id, was based upon *Dunn vs. Blumstein*, 405 U.S. 330, *Abington School District vs. Schempp*, 374 U.S. 203, *Shapiro vs. Thompson*, 394 U.S. 618, *NAACP vs. Button*, 371 U.S. 415, *Kelly vs. Johnson*, 425 U.S. 238, *Elrod vs. Burns*, 427 U.S. 347, all Supreme court decisions, whose rationale support the principal of *Pienta*, supra. See also *Perry vs. Sinderman*, 408 U.S. 593; French, Unconstitutional Conditions: An

analysis, 50 Geo.L.J. 234 (1964); Van Alstyne, The Demise of the Right Privilege Distinction in constitutional Law, 81 Harv. L. Rev. 1439 (1968); Note, Another Look at Unconstitutional Conditions, 117 U. Pa. L. Rev. 144 (1968); Bruff, Unconstitutional Conditions Upon Public Employment: New Departures in the Protection of First Amendment Rights, 21 Hastings L.J. 129 (1969).

THE QUESTION IS SUBSTANTIAL

The Courts of Louisiana have failed and refused to strike down a regulation promulgated by the City of New Orleans, Louisiana, which is repugnant to the United States Constitution on numerous grounds. The result is that , not only Bruno, but a similar class of police officers, have been or will be denied certain fundamental rights. The decision in Bruno if allowed to stand could be a detrimental precedent affecting the fundamental rights of all civil servants in the State of Louisiana and possibly the United States, since other jurisdictions may copycat the regulation in question.

Furthermore the regulation in question does not satisfy either the rational relation or the compelling interest tests usually determinative in justifying the denial of fundamental rights to a citizen. *Pienta*, supra at 1259 - 1262; *Division 241 Suscy*, 538 F.2d 1264, 1266 (7th Cir. 1976) certiorari denied, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed 2d 632; *Elrod vs. Bruns*, supra, *United States vs. Girest*, 383 U.S. 745, 758 (1966). See *Passenger Cases* 7 How. 283, 492 (1849); *Crandell vs. Nevada*, 6 Wall 35, 43-44 (1868); *Paul vs. Virginia*, 8 Wall 168, 180 (1869); *Edwards vs. California*, 314 U.S. 160 (1941); *Kent vs. Dullis*, 357 U.S. 116, 126 (1958); *Shapiro vs. Thompson*, 394 U.S.

618, 629-631, 634 (1969); *Wyman vs. Bowers*, 397 U.S. 49 (1970); *Wyman vs. Lopez*, 404 U.S. (1972); *Garrity vs. New Jersey*, 385 U.S. 493 (1967); *Spevock vs. Klein*, 385 U.S. 511 (1967).

Moreover the purpose of the regulation in question can be accomplished by other means, which do not deny police officers fundamental rights, and/or subject them to house arrest. For instance, according to the Police Executive Research Forum and Police Foundation, Survey of Police Operational and Administrative Practices Ch 9 p. 67 (1981) ninety (90%) percent of the nations police departments do not confine their employees to their home during sick or injury leave.

In addition, inherent in the punitive aspect of the regulation is the deterence necessary to accomplish the purpose of the regualation in question. Offending police officers, as provided for by Civil Service Rule IX, Section 1.1, may receive the following penalty: (1) removal from service (2) retirement (3) reduction in pay (4) demotion (5) suspension without pay for a maximum of 120 days (6) assessment of a fine.

Detection of any abuse of sick leave regulations may be accomplished by normal investigative procedures, which a police department should have expertise in, rather than denying police officers fundamental rights.

CONCLUSION

Probably jurisdiction should be noted.*

*(The Court may wish to consider summary reversal.)

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing jurisdictional statement have been served on counsel for all parties by depositing same in the United States Mails, postage prepaid and properly addressed, this 21 day of May, 1985.

_____

Michael Barry

84-1891

NO.

Office - Supreme Court, U.S.
FILED
MAY 21 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

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APPENDIX

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APPENDIX A

Police Officer Vincent Bruno
S.S.N. 437-70-3196, Badge #1247
1721 Abadie Avenue
Metairie, Louisiana 70003

Dear Officer Bruno:

An administrative report documenting abuses of departmental procedures regarding sick leave has been submitted to my office for determination of disciplinary action. The investigation was conducted by Sergeant Liniel Thompson of the Internal Affairs Division. The investigation revealed the following instances of violations of departmental rules and procedures.

On October 21, 1979, you notified your superior officer that you were ill and you were placed on sick leave. You remained on sick leave until February 1, 1980 at which time you had exhausted all sick leave and you were placed on annual sick leave.

On November 24, 1979, without notifying the Department or obtaining permission you traveled to Detroit, Michigan. In your statement to Agent John Dupre you stated that this trip was made for business purposes and relaxation.

On November 30, 1979, your place of confinement was checked by Sergeant Edward Clogher and Sergeant Arnesta Taylor of the Urban Squad and you were not at your place of confinement. In your statement to Sergeant Liniel Thompson you stated that you attempted to call the Urban Squad office to inform them that you were going to your doctor's office but as the line was busy, you left

without notification.

On December 13, 1979, you acted as a judge for a talent contest at Frankie Brent's Lounge located at 4724 Utica Street, Metairie, Louisiana, without obtainting permission to leave your place of confinement.

On December 28, 1979, you were interviewed at the WWL Studios located at 1024 North Rampart Street, New Orleans, Louisiana, by I.J. Hudson.

On January 6, 1980, you were to make a statement to Sergeant Thompson at the Urban Squad office. When you failed to appear you could not be reached at the phone number supplied by you for your place of confinement. On January 8, 1980 when Sergeant Thompson was finally able to contact you at your place of confinement by telephone, you stated that you may have been out of the house at the time due to the fact that to remain in you house caused you to become nervous.

On January 12, 1980, you met with Chief Administrative Officer of the City of New Orleans, Reynard Rochon, at the Warwick Hotel located at 1315 Gravier Street, New Orleans, Louisiana, to request that you be placed on furlough retoractive to October 21, 1979 due to the fact that your making personal appearances while on sick leave did not look good.

On January 16, 1980 you were interviewed by Sally Ann Roberts on WWL-TV away from you place of confinement.

On January 20, 1980 at approximately 9:40 p.m. you

called Deputy Chief David Kent to also request that you be placed on furlough due to the fact that id did not look good for you to make public appearances while on sick leave. You then informed Deputy Chief Kent that you were glad you caught him because you would not be at that phone number the rest of the evening, which was the phone number at your place of confinement.

On January 22, 1980 you addressed the Krewe of Endymion at the Fountain Bay Hotel located at 4040 Tulane Avenue, New Orleans, Louisiana.

On January 23, 1980 you were present at a PANO meeting at the Carpenter's Hall located at 315 South Broad Street, New Orleans, Louisiana.

On January 31, 1980 you attended a fund raiser for President Carter at the Hilton Hotel, Number 2 Poydras Street, New Orleans, Louisiana.

On February 5, 1980 you were at a PANO meeting away from you place of confinement.

On February 29, 1980 you were interviewed at WDSU Studio at 520 Royal Street, New Orleans, Louisiana.

On March 10, 1980 you were a guest on a radio talk show for approximately three hours at WSMB Radio Station located at the Maison Blanche Building at 901 Canal Street, New Orleans, Louisiana.

On March 7, 1980 in your statement to Agent John Dupre you admitted that you traveled to Florida while on

sick leave, although you could not recall the exact dates. You futher stated that this trip was for relaxation and business.

Absences from a place of confinement during sick leave are only authorized for visits to physicians, hosptials, clinics, or to purchase meals or medicine, and then only only when proper notification is given to the department prior to such absence. The above cited incidents where you were absent from you place of confinement were not authorized and further you did not give proper notification.

When questioned by Agent John Dupre about the numerous incidences were you were away from your place of confinement you stated that you had not notified anyone that you were going to leave your place of confinement or that you could not recall whether or not you had attempted to notify your superiors.

A check was made at the records at the Urban Squad office, and it was learned that since October 21, 1979, you have only called that office twice. The first time was on November 29, 1979 when you changed your place of confinement. The second time was when you notified them on December 30, 1979 you were leaving your place of confinement to get something to eat. The Urban Squad has no other records of you changing your place of confinement or leaving your place of confinement.

Your conduct as hereinabove outlined is found to be in violation of ASOP 75.0, paragraph 2, Sick Leave and Rule 4, paragraph 2, Instructions from Authoritative Source, which reads as follows:

"ASOP 75.0, Paragraph 2

A Sick leave period commences at the time the member notifies the Desk Officer. A member on sick leave shall remain in his residence or other approved place of confinement for the entire sick leave period, except to visit a physician, hospital, clinic, purchase meals or purchase medicine. The member shall notify his Unit of assignment before leaving and upon returning from such a visit (exceptions below).

If the member is assigned to a unit that is not open on a 24 hour basis, notifications shall be made by telephone to Health Services Section or that section's Code-A-Phone."

"Rule 4, Paragraph 2

INSTRUCTIONS FROM AUTHORITATIVE SOURCE

A member shall professionally, promptly, and fully abide by or execute instructions issued from any authoritative source. If the instructions are reasonably believed to be in conflict with the Rules and Procedures of the Department or other issued instructions, this fact shall respectfully be made known to the issuing authority. If the issuing authority elects to insist upon execution of the instructions which are reasonably believed to be in conflict with Department Rules and Procedures, then the member receiving the instructions shall have the right to request and is entitled to receive, IMMEDIATELY, said instructions in writing, except in cases of emergency as determined by the supervisor. The issuing authority shall be held responsible should any conflict materialize; however, no instructions shall be issued or executed which are in violation of law."

On March 7, 1980 a hearing was held to allow you an opportunity to explain your conduct. You offered nothing in mitigation nor could you explain or justify your actions. I ordered you to see a doctor for a medical examination. The report by Dr. Browder dated March 7, 1980, states you are physically able to return to work. I informed you of the results of the examination and that you were able to go back to work as of March 7, 1980, however, you have failed to do so.

On March 10, 1980, Lieutenant Rinal Martin called you to order you back to work, however, you stated that you had suffered a heart attack and you were again reminded of Dr. Browder's report. On March 11, 1980, you rendered a note from a Dr. John P. Pratt stating that you had consulted him for "evaluation and treatment for possible stress related problems." However, as previously mentioned above, that same day you appeared on the WSMB talk show.

Your conduct in refusing to return to work despite my directive is found to be in violation of Rule 4, paragraph 2, Instructions from Authoritative Source, which reads as follows:

INSTRUCTIONS FROM AUTHORITATIVE SOURCE

A member shall professionally, promptly, and fully abide by or execute instructions issued from any authoritative source. If the instructions are reasonably believed to be in conflict with the Rules and Procedures of the Department or other issued instructions, this fact shall respectfully be made known to the issuing authority. If the issuing authority elects to insist upon execution of the instructions which are reasonably believed to be in conflict with Depart-

ment Rules and Procedures, then the member receiving the instructions shall have the right to request and is entitled to receive, IMMEDIATELY, said instructions in writing, except in cases of emergency as determined by the supervisor. The issuing authority shall be held responsible should any conflict materialize; however, no instructions shall be issued or executed which are in violation of law."

Every police officer assigned to the Department has been provided a copy of the Rules and Procedures of the New Orleans Police Department. You had full knowledge of the procedures governing the conduct of an employee while out on sick leave.

Your conduct on November 24, 1979; November 30, 1979; December 13, 1979; December 28, 1979; January 20, 1980; January 22, 1980; January 23, 1980; January 31, 1980; February 5, 1980; February 29, 1980; March 10, 1980 and in traveling to Florida show a complete utter disregard for and abuse of the rules and procedures of the Department governing sick leave established by ASOP 75.0, paragraph 2.

In addition to finding you in violation of the rules and procedures of the New Orleans Police Department I find that you have violated Civil Service Rule IX which reads as follows:

"RULE IX - DISCIPLINARY ACTIONS

Section 1. MAINTAINING STANDARDS OF SERVICE

1.1 When any regular employee in the classified service is unable or unwilling to perform the

duties of his position in a satisfactory manner or has committed any act to the prejudice of the service, or has omitted to perform any act that it was his duty to perform, or otherwise has become subject to corrective action, the appointing authority shall take action warranted by the circimstances to maintain the standards of effective service. The action may extend to (1) removal from the service, (2) retirement, (3) reduction in pay to the next lower rate in the range for the class (4) demotion to any position of a lower class that the employee is deemed by the appointing authority and the Director to be competent to fill, (5) suspension without pay not exceeding in the aggregate one hundred twenty (120) days in any period of twelve (12) consecutive calendar months, (6) fine. (as amended February 9, 1955 and August 9, 1979)"

Accordingly, you are hereby notified that effective March 14, 1980 your employment with the New Orleans Police Department is terminated for the above reasons. You are further notified of your right to appeal this decision to the Civil Service Commission.

Very truly yours
JAMES C. PARSONS
Superintendent of Police

JCP/gf

cc. Dept. of City Civil Service
N.O.P.D. Personnel Division
N.O.P.D. Payroll Section
N.O.P.D. Credit Union
Patrol Division
Commander, Urban Squad
Internal Affairs Division

APPENDIX B

VINCENT J. BRUNO	:CIVIL SERVICE COMMISSION
VS.	
	:CITY OF NEW ORLEANS
DEPARTMENT OF POLICE	:NO. 1490

Vincent J. Bruno was employed by the Department of Police as a Police Officer. He was dismissed on March 14, 1980 for abuse of sick leave by Superintendent James C. Parsons. He has appealed his dismissal to this Commission.

The matter was assigned by the Civil Service Commission to a Hearing Examiner pursuant to Article X, Section 12 of the Constitution of the State of Louisiana, 1974. The hearing was held on May 14, 1980, June 17, 1980, and June 19, 1980. The testemony presented at said hearing was transcribed by a court reporter and a copy of said transcript and all documentary evidence has been reviewed by the three undersigned members of the Civil Service Commission.

Appellant reported in sick on October 21, 1979 and remained on sick leave until February 1, 1980 when his sick leave was exhausted. He was then placed on annual leave-sick pursuant to Police Department procedures until he was finally terminated on March 14, 1980 for abuse of sick leave.

Paragraph 2 of the Police Department Sick Leave Procedure (ASOP 75.0) provides as follows:

A sick leave period commences at the time the

> member notifies the Desk Officer. A member on sick leave shall remain in his residence or other approved place of confinement for the entire sick leave period, except to visit a physician, hospital, clinic, purchase meals or purchase medicine. The member shall notify his Unit of assignment before leaving and upon returning from such a visit (exceptions below). If the member is assigned to a unit that is not open on a 24 hour basis, notifications shall be made by telephone to Health Services Section or that section's Code-A-Phone.

The letter of dismissal cites sixteen abuses of this procedure. The activities allegedly undertaken by Appellant while on sick leave included leaving his place of confinement for travel to Detroit, New York, Florida, Philadelphia, Cincinnati, and Washington, D.C., judging a beauty contest at Frankie Brent's Lounge, being interviewed on TV on three occasions, attending a fund raiser for President Carter, attending meetings of PANO and the Krewe of Endymion and appearing on a WSMB radio talk show. At the Civil Service hearing, Mr. Bruno testified that in each instance he called the Urban Squad to report his departure from his residence and thereby complied with the rule. In a statement given by Mr. Bruno on March 7, 1980 to the Internal Affairs Division he stated that he did not remember notifying the Urban Squad that he was leaving his place of confinement. Urban Squad records do not reflect that they were notified except in very few instances. Even though Appellant did present evidence which called into question the total accuracy of the Urban Squad's sick leave records, we find that the City carried its burden of proving that Mr. Bruno was not reporting absences from his place of confinement. Further, the reasons for his absence (i.e., out of state travel, beauty contests, etc.) were

not those allowed by the rule. Even though this finding is sufficient to dismiss the appeal, there is another matter which should be noted.

The record makes the Commission wonder whether Mr. Bruno was sufficiently ill to be absent from October 21, 1979 to March 14, 1980 or whether he was using illness as an excuse to avoid his duties with the Urban Squad and use his time for PANO activities. He complained of "heart seizures" but his commanding officer knew nothing of this ailment until his discharge. His doctor told him not to return to work so as to avoid "stress". However, Mr. Bruno spent his time on union business which would seem to present greater stress. Appellant produced only one of his physicians, Dr. Harold H. Philbert at the hearing. His testimony seemed evasive. He stated that he did not practice cardiology, and he had no records of Appellant's vists or the drugs prescribed. None of the Appellant's other physicians testified. The City's physician found Appellant fit for work.

For the foregoing reasons, the appeal is dismissed.

APPENDIX C

Vincent BRUNO

v.

DEPARTMENT OF POLICE

No. 12506.

Court of Appeal of Louisiana

Fourth Circuit.

June 29, 1983.

On Rehearing June 6, 1984.

Writ Granted Oct. 5, 1984

Appeal was taken from order of city civil service commission affirming dismissal of officer from police department for having violated departmental regulations governing conduct of police officers while on sick leave. The Court of Appeal, Augustine, J., held that: (1) evidence was sufficient to support finding that officer knowingly and intentionally violated sick leave regulations, and (2) there was a real and substantial relation between conduct of officer in committing 15 separate violations of sick leave policy and efficient operation of the police department, and thus dismissal was neither arbitrary nor discriminatory, but founded upon good cause. On rehearing, the Court further held that the regulations were not unconstitutional on their face or as applied.

Charles J. Willoughby, Asst. City Atty., Salvador Anzelmo, City Atty., New Orleans, Grant E. Morris, Washington, D.C., Bruce E. Naccari, Asst. City Atty., Bernette J. Johnson, Galen S. Brown, Deputy City Attys., New Orleans, for defendant-appepellee.

Before GARRISON, AUGUSTINE and WARD, JJ.

AUGUSTINE, Judge.

On March 14, 1980, Officer Vincent J. Bruno was dismissed from the New Orleans Police Department for having violated departmental regualtions governing the conduct of police officers while on sick leave. Bruno appealed his dismissal to the Civil Service Commission of the City of New Orleans and, following lengthy trial, the Commission affirmed, finding just cause for Bruno's termination. By this appeal, Vincent Bruno seeks reversal of the Commission's findings.

I

From the outset, it is critical to define clearly and objectively the true bounds of this controversy, for there can be no denial that long before the events which directly concern us today, these disputants had become embroiled in a bitter political conflict whose direct result was the policeman's strike and ensuing cancellation of Mardi Gras in February of 1979. Officer Bruno, it will be recalled, was the leader of the striking union, the Policeman's Association of New Orleans (P.A.N.O.), and it was he who suffered the wrath of many of our citizenry and city officials in whose minds Bruno caused the ruin of "the greatest free show on earh." But such consequences cannot deter us from our propoer object, which is to separate that which is truly at issue from that which is not. Any objective inquiry concerning the propriety and legality of Bruno's dismissal must therefore begin with this simple question, and no other:

Did Officer Bruno violate New Orleans Police Department regulations governing conduct while on sick leave?

II

The Regulations

[1] The specific regulations said to have been breached by Officer Bruno are:[1]

> 1) Departmental Regulation 630-3, par 3 - "An employee on sick leave shall not leave his residence or other authorized location of confinement prior to returning to duty from sick leave, except as provided hearin."
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> 2) D.R. 630-3, par. 4. "Employees who must visit personal physicians during periods of sick leave shall notify their unit accordingly..."'
>
> 3) D.R. 630-3, par. 6. "When it is necessary for an employee to leave his place of confinement to purchase medicines or meals not available at his place of confinement, notification shall be made to the employee's Unit or the Command Desk..."'
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> 4) D.R. 630-3, par. 9. "Employees on extended sick leave, for an illness or any injury, may arrange for advance approval from the Medical Section for activities related to coninued treatment, convalescence and rehabilitation so that notification of each instances (sic) of leaving the place of confinement will not be necessary."

On October 25, 1978, D.R. 639-3, paragraph 9, supra, was modified to insure that

> "an employee who has permission from his attending physician to leave his place of confinement shall secure departmental permission through the chain of command from the Superintendent or Deputy Superintendent of Police. Such request must be secured prior to the

[1] These regulations went into effect on June 22, 1975.

employee actually leaving his place of confinement."[2]

The above regulations were again amended on November 4, 1979 - about two weeks after Bruno's sick leave began - by ASOP 75.0, a series of regulations which included the following:

> "2. ...A member of sick leave shall remain in his residence or other approved place of confinement for the *entire* sick leave period, *except* to visit a physician, hospital, clinic, purchase meals or purchase medicine. The member shall notify his Unit of assignment before leaving and upon returning from such a visit...(Emphasis added).

III
The Undisputed Facts

The following conduct on the part of the appellant is undisputed:

> 1) October 21, 1979—At his request, appellant was placed on sick leave because of an ear infection. Bruno listed his place of confinement as Norgate, New Jersey.
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> 2) October 22, 1979—The day after being placed on sick leave, Officer Bruno travelled to Ventnor, New Jersey.
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> 3) November 24, 1979—Appellant travelled to Detroit, Michigan, where for three days, he engaged in activities related to his position as

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[2] Interoffice Correspondence, Department of Police, October 25, 1978. Submitted in evidence as City Exhibit No. 1.

leader of PANO. From Detroit, Bruno travelled to Washington, D.C., and Miami, where he again conducted union activities.

4) November 30, 1979—Sergeant Clogher and Sergeant Taylor placed a telephone call to the appellant at his residence, but received no answer. Bruno admitted that he was not home at the time, and explained that earlier, he had called Urban Squad (appellant's regular unit) to report his intention to keep an appointment with his doctor, but that the line was busy.

5) December 13, 1979—Vincent Bruno participated as a judge in a talent contest held at a Fat City nightclub.

6) December 28, 1979—Appellant was interviewed by reporters at the studios of television station WWL.

7) January 6, 1980—Officer Bruno failed to appear at a scheduled conference with Sergeant Liniel W. Thompson. Bruno explained his absence as due to lack of communication about the time and place of the meeting.

8) January 12, 1980—Bruno met the City's Chief Administrative Officer, Reynard J. Rochon, at a downtown hotel to discuss Bruno's union activities and the apparent impropriety of conducting such activities while on sick leave.

9) January 16, 1980—Officer Bruno was interviewed by news reporters for WWL, away from his place of confinement.

10) January 22, 1980—Officer Bruno addressed a Mardi Gras organization, the Krewe of Endy-

mion, at a mid-city hotel.

11) January 23, 1980—Officer Bruno left his place of confinement to attend a PANO meeting at the Carpenter's Hall, 315 South Broad Street, New Orleans.

12) January 31, 1980—Officer Bruno attended a fund raiser for President Carter at a downtown hotel.

13) February 5, 1980—Officer Bruno attended a PANO meeting, away from his place of confinement.

14) February 29, 1980—Officer Bruno was interviewed at the WDSU television studio in New Orleans' French Quarter.

15) Sometime between March 1 and March 14, 1980—Bruno travelled to New York and Philadelphia to conduct union activity. Bruno freely admitted having made this trip, but could not specify the date, recalling only that the trip was some time in March 1980, prior to his dismissal.

16) March 10, 1980—Officer Bruno appeared on a radio talk show.

17) March 14, 1980—Appellant is dismissed from the New Orleans Police Department. That same day, Bruno departed for Cincinnati, but it cannot be known from the record whether Bruno's travel arrangements had already been made as of the time he received notice of termination, nor is it clear whether Bruno received the letter before departing.

The City's chief contention is that each of Bruno's above-cited departures from his place of confinement was without authority and without notice to his superiors, and therefore contrary to departmental regulations. We acknowledge the merit of the City's position.

To reiterate, Officer Bruno readily concedes each of the above-cited departures from his place of confinement. It must be borne in mind that under the regualations, when an officer departs his place of confinement for any purpose *other than* to purchase meals or medicine, or to visit a physician, *mere notification* of departure to the officer's unit or command desk *is not sufficient.* Such activities as judging a talent contest or addressing a Mardi Gras Krewe plainly require "departmental *permission* through the chain of command from Superintendent or Deputy Superintendent of Police." D.R. 630-3, par. 9, (as modified) supra. (Emphasis added). The evidence clearly shows that no such permission was ever sought or granted.

Had Officer Bruno sought permission to conduct his varied activities, regulations required that he initiate arrangements with the first link in his chain of command, his commanding officer, Rinal Martin. When called as a witness before the Commission, Lt. Martin unequivocally stated that at no time did Bruno obtain permission to travel to Detroit, Philadelphia, New York, etc., or to judge a talent contest, or to conduct interviews away from his place of confinment. Indeed, Bruno did not even *notify* Lt. Martin or any other superior officer of his intention to conduct such activities. It follows that Bruno was in clear violation of departmental regulations.

As we have already pointed out, appellant was fully

aware of the impropriety of his conduct, for that was a principal topic of his discussion with the City's Chief Administrative Officer, Reynard Rochon, on January 12, 1980. The purpose of the meeting was to reconcile Bruno's commitments to the union with his commitments as a police officer. It thus appears to us that inasmuch as the meeting was at Bruno's instance, he earnestly sought to avoid confrontation with the City and the Superintendent of Police, James C. Parsons.

Bruno could not reconcile his union activities with his duties as a police officer, *unless* he were placed on extended furlough, and thus be released from the sick leave regulations. Confrontation became inevitable, then, when Bruno's requests for extended furlough were denied, first, by Lt. Martin, and later by the Deputy Chief of Police David Kent.

At the hearing of this matter, Kent testified that on January 20, 1980, he informed Bruno that he could not be carried on furlough because, as Kent expressed it:

> "His professional obligation (was) to return to a full duty status. By that I meant to working status, at which time he could then make petition or request to be carried on annual leave."

During that same coversation, Kent told Bruno that it would constitute a violation of departmental policy to be away from his place of confinement without prior approval. Kent accompanied his warning with the observation that given Bruno's high degree of visibility, such conduct while on sick leave jeopardized not only Bruno's public image but the department's as well. This appeal to Bruno's sense of duty and propriety, however, went unheeded - two days

later, Bruno addressed the annual gathering if the Krewe of Endymion.

Further testimony from Bruno's chain of command was offered by Superintendent of Police, James Parsons, who categorically denied having given Bruno permission to change his place of confinement from Norgate, N.J. to Ventnor, or New York, or Philadelphia, or Cincinnati, or Miami, and denied giving Bruno authority to engage in any of the activities in question. Finally, with respect to the critical question whether Bruno had ever received permission, Bruno himself admitted to the Internal Affairs Division on March 7, 1980 that he could not recall having even notified any officer of his intention to depart his place of confinement. Although Bruno later retracted that statement before the Commission, explaining that at the time of the statement, he was under the influence of Valium, the Commission was warranted in disregarding his recantation, for several witnesses to his condition at the time testified that he was coherent and in full control of his faculties. Moreover, not a single desk officer was able to verify that Bruno had called to notify of his departures to secure medicines, meals, and so on, as required by D.R. 630-3, par. 6, supra.

But that is not the focus of our concern. For Bruno to seek vindication on the premise that he notified his desk officer is to inject a bogus defense, for as we have stated, mere notification of that sort cannot serve as the sufficient requisite to the types of activities which Officer Bruno conducted. Regulations required that he first obtain *permission* through the chain of command, and it is clear that this was not done.

Appellant argues that even if it be proved that his conduct violated the regulations in an objective sense, he should nevertheless be excused for lack of knowledge of those rules. He claims subjective innocence.

That defense is untenable. It is inconceivable to us that of Bruno's experience could hopscotch from one state to another on personal business, conduct radio and television interviews, judge a nightclub talent show, and address a Mardi Gras krewe without knowing that he was, in the process, running afoul of sick leave regulations.

In any event, the City does not merely posit Bruno's *constructive* notice of regulations. During Bruno's hearing before the Internal Affairs Division on March 7, 1980—wherein the appellant informed his superiors for the *first time* that the illness which requried his absence from duty was no longer an ear infection, but a heart condition—Bruno was ordered to undergo an immediate physical examination which was completed that same afternoon by physicians at the Tulane University School of Medicine. The examining doctors found nothing which might impede appellant's job performance, whereupon Chief Parsons personally ordered Bruno to return to duty. Bruno defied that order by appearing on a radio talk show during working hours only three days later. Immediately after the broadcast, Bruno was called at the radio station by his commanding officer, Lt. Martin, who reiterated Chief Parson's order to return to duty. On his way home from the station, Bruno called Lt. Martin to advise that he (the appellant) had just then suffered a heat seizure. Lt. Martin then withdrew the order to return to work, but reminded Bruno that only a few days before, he had been found fit for duty by a qualified physician.

It is obvious to us that in the eyes of Superintendent Parsons and Chief Deputy Kent, Bruno's post-examination behavior was the proverbial straw that broke the camel's back. Four days after Bruno's talk show interview, Chief Parsons drafted Bruno's letter of dismissal.

We thus proceed to answer the first question, and hold that since it has been amply demonstrated that Officer Bruno did not on any occasion obtain permission from the chain of command to leave his place of confinement, it necessarily follows that in every instance cited, the appellant knowingly and intentionally violated N.O.P.D. sick leave regulations.

IV
The Dismissal

The only remaining question is whether Bruno's violations were so serious as to warrant his dismissal. We hold that they were.

[2] In determining whether an employee should be dismissed for off duty misconduct, the test is whether there is a real and substantial relation between the conduct of the employee and the efficient operation of the public service. *Leggett v. Northwestern State College*, 242 La. 927, 140 So.2d 5, 9 (La.1962).

[3] As we apply the above test, is cannot escape our knowledge that Officer Bruno's outright defiance of departmental authority is impressive by its sheer frequency and duration. Over the course of five full months, from October 1979 until March 1980, the appellant committed no less than fifteen separate violations of sick leave policy.

In each instance, Bruno flouted a regulation whose reasonableness should be apparent to anyone even vaguely aware of the need for discipline within a large urban police department. Indeed, the principle upon which the regulation is based is so self-evident as to dispense with explanation. True, the police department did not formally contest Bruno's assertion that he had been ill throughout the period in question, but any employer would rightly feel betrayed upon witnessing the prolonged breach of trust evidenced here. Officer Bruno's employer was the City, or more correctly, the taxpaying public, who must have considered themselves betrayed upon learning that Officer Bruno received pay—their tax dollars—during his absence from duty. It is natural that appellant's conduct shouuld engender among the people a generalized contempt for our entire system of law enforcement. Such destructive consequences are intolerable to a well ordered police department, whose character must remain beyond public reproach, and it cannot be proposed that Officer Bruno's status as a once highly visible union leader confers any immunity not enjoyed by his fellow officers. The misconduct which spawned these consequences demands the most emphatic rejection.

There may be those who believe, as my dissenting brother does, that Officer Bruno was a purely political casualty. But it cannot matter that the appellant's chief adversaries were the Superintendent of Police and the City Administration, unless it be clearly proved *on the record* that the dismissal was motivated principally by revenge and vindictiveness. The record before us is empty of such proof, and indeed appellant himself does not seek reversal

on those grounds.[3]

Moreover, it cannot seriously be contended that Officer Bruno was singled out for discriminatory treatment. We are convenced that had *any* officer of the New Orleans Police Department conducted himself as Officer Bruno did, he would have been dismissed from his duties. The proof of this is that in 1977, Officer James M. Willem received a ninety day suspension for violating the same regulations. We upheld that penalty on appeal, even though Willem's single transgression was to appear at a bar without reporting to authorities. See *Willem v. City of New Orleans Dept. of Police*, 368 So.2d 1235 (La.App. 4th Cir.1979). Similarly, in *Timmons v. Municipal Fire & Police Civil Service Board*, 395 So.2d 1372 (La.App. 1st Cir. 1981), the Court affirmed the dismissal of a police officer who was discovered in a bar while on sick leave. There, it was said that:

> "A police departmental order prohibiting an officer on sick leave from drinking in a bar or lounge bears a *real and substantial relationship* to the ap-

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[3] Appellant's own brief states, at page 10:

"What motivated Superintendent Parsons and his subordinates to want to dismiss Officer Bruno probably does not interest this Court. Counsel for appellant will be satisfied to submit to this Honorable Court that Officer Bruno received no notice, nor had he been sanctioned (suspended, et cetera) previously for sick leave abuse. Therefore reprimand, or possibly suspension, seems an adequate as (sic) punishment."

We respond, first, that Chief Deputy Kent had warned Officer Bruno as early as January 20, 1980 that his conduct was in violation of departmental regulations. Moreover, Officer Bruno's conduct prior to the events charged was not at issue before the Commission, nor should it be at issue here. We are concerned only with the violations alleged to have occurred between October 21, 1979 and March 14, 1980.

> propriate governmental objective of maintaining public confidence in the police force. The departmental order bears a reasonable relation to the goal sought to be attained by the police department, i.e., integrity and confidence in the police force, and the order was adopted in the interest of the community as a whole. *Everett v. Goldman*, 359 So.2d 1256 (La.1978). It is clearly a valid objective of the police department to prevent off duty sick police officers from frequenting barrooms. Public confidence in the police force could be severely undermined if police officers who were allegedly sick were allowed to continue to requent bars and lounges. *Timmons*, supra, at 1376. (Emphasis added).

In conclusion, we hold that there was a real and substantial relation between the conduct of Officer Bruno and the efficient operation of the New Orleans Police Department, and that the dismissal was neither arbitrary nor discriminatory, but founded upon good cause.

For the reasons assigned, the findings of the Civil Service Commission are hereby affirmed.

AFFIRMED

GARRISON, J., dissents with reasons.
GARRISON, Judge, dissenting.

I

The Man Who Stole Mardi Gras

> "And yet you continued to be actively engaged in union activities, you went out of town on at least three occasions, to Detroit, New York and Florida on union business, and you attended at least two

union meetings and you spoke to the Krewe of Endymion concerning possible police action..."[1]

This case appears to me to involve the officially sponsored railroading of a veteran police officer of may years' service. It grows out of a classic union-busting effort of a kind rarely seen in present day city administrations. At another level, the case addresses itself to the elaborate use of the machinery of justice to accomplish injustice.

Specifically, the case concerns the dismissal of Officer Vincent Bruno supposedly for violation of "police department sick leave regulations." Officer Bruno had thirteen years of service and was well on his way towards earning a sixteen-year retirement—that lure which was established during the postwar years to bring into the police department men who otherwise might not have joined.

Ordinarily, the fact that an officer had many years of service, and was close to earning his pension, would be cause for some consideration prior to any action against him for an alleged infraction of minor regulations. But this was not the case with regard to Officer Bruno. He was the man who—or so some apparently thought—stole Mardi Gras. He was the Grinch who stole Christmas.

For Officer Bruno was the leader of the police union when it struck against the City of New Orleans. As the result of this police strike Mardi Gras was cancelled for the

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[1] Cross-examination of Officer Bruno at Civil Service Commission hearing. Page 85, Transcript II.

first time since World War II.[2]

From the announced circumstances of Bruno's firing for violation of "sick regulations" by Police Superintendent Parsons, a casual observer might think that little notice had been taken of his police union activities, of the police strike which he led against the City and of the subsequent cancellation of Mardi Gras. A review of this case, however, leaves no doubt that the *real* reason for the dismissal of Officer Bruno was his activity as the union leader of the police strike and the closing down of Mardi Gras which followed. One additional factor, the joinder of his union with the national AFL-CIO quite apparently determined his actual date of dismissal because he was fired the very next day. The allegation that Bruno was fired for violation of any kind of regulation whatsoever, as will be seen, is sheer artifice and a distinct fraud upon our legal system.

The particular union of which Vincent Bruno was the head—and which he was leading at the time of the police strike against the City—was the Police Association of New Orleans (PANO). The cancellation of Mardi Gras by the City administration fell on February 27, 1979.

It is rather hard not to notice that in March, 1979, the City Finance Officer in formed that union, among other organizations, that the City was going to end its practice of takingout payroll deductions, requested by City employees, in the union's behalf. It was announced that these deductions, known as "check-offs", were being stop-

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[2] Judicial cognizance, as taken here, is applicable to "...(6)...the facts of history and the political, social and racial conditions prevailing in this state..." R.S. 15:4222.

ped by the City because of a reduced budget. This action, had it been successful, could have created an overnight survival problem for the police union, not to mention the others.

The City adminstration's effort to stop payroll deductions from going to the police union and other associations soon enough was in the courts, where ultimately it was blocked. But, as the record in the instant case shows, the City's investigation of Officer Bruno was underway by November of 1979, and the results of that Alphonse and Gaston tableau are now before us.

All of this was in the name of good government, of course. The check-offs for the police union were to be terminated—not because the union had struck against the City at Mardi Gras, but ostensibly because the adminstration was concerned about budget problems. The thirteen-year police career of the union leader was to be terminated—not because he led the police union's strike against the City, but ostensibly because he had problems with his sick leave. Or so it was all publicly explained by administration spokesmen.

However, I cannot blind myself to the true circumstances in which the City, after having attempted to discipline the police union, managed to catch its leader by the heels. When the royal elephant is found missing and the power elite charges its selected suspect with dropping cracker crumbs on the floor, are we really supposed to believe that the local government is frenzied by cracker crumbs on the carpet?

It is plain that the City sought to dispose of the pro-

blem of the pesky police union officer by resorting to the cunning and deceitful use of law enforcement machinery—a project in which it succeedded more than I would have thought possible. It is also plain—from the enthusiasm with which they joined the chase—that once the hunt was underway the pursuers did not lack for official allies in cornering the union leader. A few may have felt unhappy about the cancellation of Mardi Gras and a few others may have felt unhappy about unions, but they seem to have put aside their personal feelings out of their common devotion to the Police Department's sick leave regulations. Surely, they must have reasoned, a small public hanging might not be out of order for the man who stole Mardi Gras.

The writer, Kafka, makes the point that sometimes those in power are not overly concerned about the existence of actual guilt so long as the proper law enforcement procedures are followed.[3] In any case, the official phalanx rolled smoothly against the leader of the police union. The Police Department finished its part of the case when Superintendent Parsons charged Officer Bruno with violating sick leave regulations (and then, in the the same breath, found him guilty).[4] The City Attorney's Office adroitly explained how the top command of the Police Department had managed to crack the case: "During Mr. Bruno's absence from work his superiors suspected that

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[3] In *The Trial* Joseph K. is arrested but never told the reason for his arrest. At the court he is never told what the charges are. The court chaplain informs him that he will probably be convicted, however he does not know what the charges are either. Ultimately, two formally dressed men arrive at his home to pick him up. He is taken to an abandoned quarry where he is executed.

[4] See March 14, 1980 letter to Bruno from Superintendent Parsons.

Mr. Bruno was possibly in violation of sick leave regulations."[5]

One can almost sense the impatience with Officer Bruno's plea of innocence at the Civil Service Commission hearing. "...(Bruno) contends that he didn't know of the 1978 sick rule change," an assistant city attorney aruged. "Surely, Mr. Bruno, a police officer with thirteen years experience, knows it's his obligation to keep current with the department's rules."[6]

When the government acts ignobly injures not only the individual who has become its prey. It hurts our system of laws as well. Many people observe what is actually happening and, not fooled by the atendant protocol and rote of a particular travesty which may be unfolding before them, lose confidence in the entire machinery of justice.

To allow a law enforcement authority to switch a charge to a more convenient accusation is tantamount to encouraging that authority to select the convenient charge at the outset and find the evidence later. It is all very well for the Queen to announce "Sentence first—verdict afterwards,"[7] but in New Orleans the Superintendent of Police cannot do that and neither can the City Administration.

The charges initiated against Officer Bruno plainly

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[5] City Attorney's Memorandum on Behalf of the Department of Police, filed in connection with the Civil Service hearings. Transcript I.

[6] Ibid.

[7] See Chapter 12, *Alice in Wonderland*, by Lewis Carroll.

were arbitrary, carpricious, discriminatory and contrived. In my regard, the majority of this panel—instead of lending credence to such mendacity—should have concluded that it was error for the Civil Service Commission to uphold such obvious false charges.

II

Freedom of Speech

> "No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write or publish his sentiments on all subjects, being responsible for the abuse of that liberty."[8]

The circumstances of the "sick leave violation" charges against Officer Bruno indicate perception that any earlier charges related to his leadership of the police strike might encounter First Amendment problems. Waiting for a distinct time interval, then charging him with an alleged offense off to the side off the picture, clearly was the chosen solution. Thus it came to pass that, some months after the Mardi Gras strike had subsided, Bruno "ran afoul of sick leave regulations."[9] Nevertheless, like Wile E. Coyote having another one of his inventions blow up in his face, Officer Bruno's superiors appear to have run afoul of the First Amendment.

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[8] Louisiana Constitution of 1974, Art. 1 § 7.

[9] This phrase is quoted from Judge Augustine's majority opinon in this case (upholding appellant's dismissal from the police force.) Its languate suggests that Bruno's sick leave problems simply represented a stroke of bad luck for him, free of any initiation by City officials lacking enthusiasm for his welfare. This theory—which could be called the "open manhole" theory— seems to suggest that there is no point in looking too closely behind the facts inasmuch as everthing happens for the best (at least for those employees who know which side their bread is buttered on).

Both the United States and Louisiana Constitutions forbid government actions which have the effect of denying freedom of speech to any individual.[10] I believe that this factor alone should act as a bar to maintaining Officer Bruno's conviction.

Superintendent Parson's letter to Officer Bruno informed him that he was being terminated for violations which included engaging in the following actions without permission:

> "...On December 28, 1979, *you were interviewed at the WWL Studios* located at 1024 North Rampart, New Orleans Louisiana, by I.J. Hudson." (Emphasis supplied).
> "...On January 16, 1980, *you were interviewed by Sally Ann Roberts of WWL-TV* away from you place of confinement." (Emphasis supplied).
> "...On January 22, 1980, *you addressed the Krewe of Endymion* at the Fountain Bay Hotel located at 4040 Tulane Avenue, New Orleans, Louisiana." (Emphasis supplied).
> "...On February 29, 1980, *you were interviewed at WDSU Studio* at 520 Royal Street, New Orleans, Louisiana." (Emphasis supplied).
> "...On March 10, 1980, *you were a guest on a radio talk show for approximately three hours at WSMB Radio Station* located at Maison Blanche Building at 901 Canal Street, New Orleans, Louisiana." (Emphasis supplied).[11]

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[10] U.S. Constitution, Amendment 1; Louisiana Constitution of 1974, Art. 1 § 7.

[11] Examples from the charges against Officer Bruno from Superintendent Parsons' letter of March 14, 1980. Transcript I.

The single common factor in each of these *charges* was Officer Bruno's exercise of the right of free speech. Yet a major part of Bruno's job as leader of the police union involved communication by him not only to fellow police officers but to the public at large. Such systematic conversion of the interchange of ideas into "violations" of departmental regulations could have a chilling effect on future union leaders or on others similarly placed. Superintendent Parsons acted improperly in this regard and the Civil Service Commission committed error in upholding his action.

III

The Police Department's Case

> Mr. Martin: How religiously is this book kept?
> Sgt. Thompson: I don't know personally.
> Q: You don't keep it up?
> A: No sir, I don't
> Q: Who does?
> A: It's the responsibility of the desk officer
> Q: And who does the desk officer work for?
> A: He works for the platoon commander.
> Q: Which is you?
> A: Which is myself.
> Q: But you don't know whether it's really kept up religiously or not?
> A: No.[12]

Even under the Department's official fiction that "sick leave violations" constituted the gravamen of Bruno's offense, its case at the Civil Service Commission hearings must be regarded as a prossecutorial disaster. Put in terms of a missile launching, it would be fair to say that the missile fell over on the launching pad.

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[12] Pages 142-143, Transcript II.

Evidently the attorneys representing the police force assumed that they could show the jusitification for Superintendent Parsons' dismissal of Officer Bruno by calling the officer as their main witness. However, as some prosecutors might have explained to them in advance, Bruno's testimony was very destructive to the police department's case. It showed, at the outset, that a gulf had developed between Officer Bruno and the police force concerning the interpretation of the key sick regulations involved. It showed, further, that the police department made no serious effort to straighten out this communication problem (which plainly developed after the Mardi Gras strike, inasmuch as Bruno had had health problems for may years while on the force with no sick leave problems for any kind arising).

The testimony demonstrated clearly that the police department's control of procedures maintaining a sick leave log book for checking in and checking out of one's residence ranged from catastrophic to nothing at all. For example, the appellant was asked if he had acted as a judge at a talent contest at Frankie Brent's Lounge in Metairie and he replied in the affirmative. Then, somewhat representative of the entire questioning (this constituting the major part of the City's case), the colloquy developed along the following lines:

Q: You know whether or not you left to attend this contest without notifying the Department?

A: I called the Urban Squad and told them I was going the address 4724 Utica Street.

Q: You recall who you talked to at that time?

A: No.

Q: But that should be in the sick leave book that's maintained?

A: I didn't know that there was a sick leave log book. I never heard of one.

Q: When someone called you when you were working, to report that they wer leaving their home to go to the doctor or the clinic or something (sic), what would you do? How would you handle that?

A: Write it on a piece of paper and when they called back, throw the piece of paper away.

Q: You never forwarded that information to any of your prosecutors?

A: Never was advised to. I wasn't even aware that there was a log at the Urban Squad or any other Division.[13]

Again, in addition to this representative sample of the absence of support for the sick leave charges he was asked whether he had checked in with the Urban Squad before departing for Detroit (on union business). His answer was: "Well, that's not entirely correct. I notified the Urban Squad office."[14] Asked whether he had given notification before leaving to speak to the Krewe of Endymion at the Fountain Bay hotel, he replied in the affirmative, particularizing that he had talked to the Deputy

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[13] Pages 52-53, Transcript II.

[14] Page 44, Transcript II.

Chief before he left.[15] Asked if he had given notification before leaving for a PANO meeting in January[16] and before leaving for a fund raising affair for President Carter[17] his answer continued to indicate that he had.

Asked whether he had given notification before leaving to speak at a February PANO meeting at 315 South Broad Street, he again responded affirmatively.[18] Here, incidentally, he was asked whether he had given a news conference at PANO, and he replied that he had.[19] Bruno's allowing of news coverage makes apparent the fact that his allegedly incriminating activity was entirely open and aboveboard.

At no time in Officer Bruno's career, the testimony showed, had he been cautioned, warned or disciplined regarding sick leave abuse until shortly before his termination. At no time during Officer Bruno's illness did any person from the Department of Police inform or caution him regarding his methods of reporting departures from and returns to his place of confinement.

The Department of Police failed to establish that Officer Bruno at any time was advised either verbally or in writing that he was abusing the Department's sick leave policy. Officer Bruno testified, and other testimony cor

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[15] Page 72, Transcript II.

[16] Page 75, Transcript II.

[17] Page 76, Transcript II.

[18] Page 77, Transcript II.

[19] Page 78, Transcript II.

roborated, that he had sought to work out his physical and psychological problems in such a way that he would not be breaking Department rules nor interfering with the orderly functioning of the Department. Indeed, the record makes it notably clear that he—and not the Department—was the sole protagonist in that effort.

Even though these examples of deteriorating charges were selected at random, they show how the police department's case died aborning. And that's the way it went with regard to the effort to show that Officer Bruno systematically failed to inform the Urban Squad before he went somewhere. In instance after instance, the testimony showed that either he had notified the squad or the records could not be found.

The Drones Club

The New Orleans Police Department is generally represented, and justifiably so it would appear, as one of the better police departments in the country. In recent years the law enforcement record with regard to crimes of high priority has been good.

However, the portions of the trasnscript just referred to make it plain that the dissemination of sick leave information and the maintenance of sick leave records are another matter. As to the efficiency of that operation, its responsiveness to sick leave problems was reminiscent of the Drones Club, that hallowed institution of P.G. Wodehouse, following a pleasant lunch, with most of its members asleep or falling asleep. "Did old Bruno ever call today?" one member might ask. "Someone called," might be the reply. "Can't remember his name."

Various documents produced by the Department of Police purported to contain all records of sick leave exercised within the Urban Squad. In particular, there was produced the log book in which compliance with sick leave requirements presumably was recorded. However, all testimony by those Police Department personnel who were personally acquainted with the keeping of this book, actually indicated that this "call-in, call-out" book was infrequently used and reflected only a fraction of those notations one would expect to find if the Duty Officer properly recorded there all the messages regardingg sick leave rules compliance. Captain Richard Martin testified that although he had been in charge of the Patrol Division for many years, had been a District Commander and was presently the Commander of the House of Detention, he had never seen a "call-in, call-out" book before, such as was produced at the hearing of this matter before the Hearing Examiner.

Officer Bruno testified that all times required he called his place of assignment, the Urban Squad office, in every instance when he was returning or departing from his place of confinement. He testified that it was his intention throughout the period to abide by the rules and regulations. For this reason, he testified, he had consulted with his immediate supervisor, Lieutenant Rinal Martin, Deputy Chief Duke, the City Chief Administrative Officer, Reynard Rochon, and the Health Service Section of the Department of Police.

With regard to medical testimony, the only such evidence was introduced by Officer Bruno. He called as a witness a personal physician, Dr. Harry Philibert, who testified concerning the heart condition which Bruno has

had for many years and which was documented in the record.[20] No one from the Police Department appeared to rebut such evidence as to Bruno's physical capabilities.

Captain Martin said that, had he known of Bruno's need for sick leave, he would have acted at the first indication. Specifically, he testified, he would have called Bruno to his office as his commanding officer to discuss the situation with him and possibly could have advised Bruno of any possible hazard of violation of sick leave regulations of that time. Chief parsons, also, admitted on the witness stand that had he seen the initial card filed on October 21, 1979, he would have tried to do something about it at the time. The Department did not contest the fact that Officer Bruno was in fact sick and the only testimony before the commission in this regard is that of Dr. Harry Philibert, who was offered both as Bruno's personal physician and as an expert.

Bruno never disobeyed any direct orders from his superiors throughout the course of his activities. He was never advised, cautioned nor otherwise notified of Department dissatisfaction with is conduct until very shortly before his precipitous termination.

His pleas for assistance with his medical and personal problems, both within the Department chain of command and to City officers, were met with indifference or

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[20] Officer Bruno, as the Police Department's personnel file showed, was retired from the National Guard active service in 1966 for a heart defect, the very same defect which has from time to time resulted in episodes of parozysmal tachycardia which render Bruno temorarily disabled.

or hostility. Early on he made an unsuccessful effort to communicate with Deputy Chief Duke. On January 12, 1980, Bruno met the City's Chief Administrative Officer, Reynard Rochon, at a downtown hotel to discuss Bruno's union activities and the seeming impropriety of conducting such activities while on sick leave. Bruno asked Rochon to intercede on his behalf so that he might be placed on retroactive annual leave and thereby be relieved from the sick leave regulations. However, no action was taken.

There is nothing in the record to indicate that the appellant has ever been accused of any act by the New Orleans Police Department which could be described as immoral or illegal. During his absence from duty due to illness, this officer appears to have obeyed orders directed to him to the best of his ability and to the extent that his medical condition would safely permit. He was not accused of acting in concert with other officers so as to create a manpower shortage by abusing sick leave.

This string of samples from the Civil Service Commission hearing serves to confirm that the case against Officer Bruno was a sham. If it hadn't been obvious before, it became obvious at the hearing. District attorneys, when a case falls apart during its presentation in court, learn simply to abandon prosecution and go on to the next case. However, there was no next case here and the leader of the Mardi Gras police strike was the target.

This extensive, even prolonged perhaps, recapitulation of the evidence from the hearing makes it clear that Officer Bruno was not guilty of the charges mounted against him. More than that, it indicates what Bruno really did not have to prove: that he was innocent of these charges.

How sharper than a serpent's tooth is a police superintendent, already harassed by the many problems of running a police force, who has been humiliated before all the world by the leader of a police union. To have maintained any semblance of fairness, the man most embarrassed by Bruno's Mardi Gras strike should not have been the judge and jury dismissing him from the force.

IV

Crime and Punishment

> Martin: Did this *March 14*, 1980 dismissal (of Officer Bruno from the police force) have any relation with the fact that approximately on *March 11* PANO announced their affiliation with the AFL-CIO?
>
> Parsons: No, Sir.
>
> Martin: Just coincidence?
>
> Parsons: Just coincidence. (Emphasis added).[21]

The appellant is a most unlikely candidate to have been targeted as the great scoff-law of departmental regulations. In his thirteen years as a police officer he was never accused of violating a single on-duty regulation. How strange it was that his long hidden tendency to fallafoul of regulations apparently did not reveal itself until he became head of the police union—and, even then, only after the cancellation of Mardi Gras.

And how strange it was, too, when he finally was

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[21] Martin is Clyde P. Martin, Bruno's attorney at the Civil Service hearing. Parsons is Superintendent of Police James Parsons. This excerpt is from page 374-375 of Transcript III.

found guilty of violating the sick leave regulations, that the punishment was so explosively disproportionate. He was sent rattling down the chute, exiled for all time from the world he had been part of for so many years, dismissed from the police force he had served long and well. Why, one has to ask, was he not given instead a suspension or a fine? Why was there no modification of any kind? Quite obviously the answer is: because Officer Bruno was being punished, for his actions as the leader of the police union.

On *March 11,* 1980, PANO (the police union) announced that it was going to join the AFL-CIO. Did Chief Parsons notice this interesting announcement of the betrothal of part of his police force to the national union? Did he perhaps have a slight reaction to this news release? Did he possibly recall that Officer Bruno was the president of PANO? Does a bear sleep in the woods?

On *March 13,* 1980, PANO was granted its local AFL-CIO charter out of Washington, D.C.

On *March 14,* 1980—the following day—Parsons wrote Officer Bruno informing him that he was discharged from the police force.[22]

At the time of being fired, Bruno was returning from Washington with a new AFL-CIO charter for his union. That's the way it really went down. Before the camouflage was set up and made the facts harder for the people to see, this is how Bruno was disposed of for doing his police union

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[22] Under the circumstances, this abrupt dismissal hardly meets the test of not being "arbitrary, capricious or discriminatory." See: *Jones v. Louisiana Department of Highways,* 259 La. 329, 250 So.2d 356, 359 (La.1971).

work perhaps not wisely but too well.

So what of the much vaunted "crime of the century", the official charge that Bruno "violated police sick leave regulations"? The simple truth is that this piece of bureaucratic deception had about as much to do with reality as the proverbial flowers that bloom in the spring.

I am mystified that the other judges on this panel have been unable to see and recognize so transparent a railroading as was done to this particular City employee. In the face of the astonishing facts surrounding his abrupt dismissal immediately after the AFL-CIO incident how can they, I ask myself, act as if this is a matter concerning sick leave regulations?

Indeed, one of the indicators, early on, that the whole "sick regulations" tableau had been untrue lay in the incredibly disproportionate sentence dropped on Bruno's head. So harsh a sentence for such a relatively minor infraction underscores the actual motivation behind the ersatz investigation and previously determined conviction of the police union leader.

For example, there are laws against jaywalking but we don't mash violators into the asphalt with steamrollers in order to discourage future jaywalkers. There are even laws against removing labels from polyester mattresses and pillows, but we don't drag violators through the streets in chains. Perhaps, however, the extremity of the sentence served to direct attention to what was being accomplished behind the artful diversion.

And art there was in the City's chronicle of Bruno's

supposedly inculpatory activity. The recitation of so-called "violations" committed by Bruno, for example, consists of an accumulation of activities not unusual for a union leader—but activities which predictably must appear to the public, with its preconceived image of police work, as outrageous for a policeman.

However, Officer Bruno had simply been doing all along what his union responsibilities required that he do—obtaining publicity for the union as its head—and what his superiors plainly could anticipate that he would continue to do. And, as the record indicates, this arrangement obviously had more than satisfied the Police Department's high command and the City administration—at least, prior to the Mardi Gras strike and the subsequent betrothal of Bruno's union to the AFL-CIO.

By presenting such seemingly breezy interludes as being sinister when performed by a policeman (e.g. "addressing a Mardi Gras krewe" or "attending a fund raiser for President Carter" or "giving a radio interview for three hours") the effect was accomplished of making the police union officer look irresponsible, even flip, to the public. He "asked for it," so the reasoning would go, "and he got it." It must have made it all the easier, when the time came, to roll him out of the way.

Visualize, if you will, a scene: A raised platoform alongside the river. The band is playing as a new addition to the New Orleans skyline is topped off. Colored baloons are floated off into the sky. A politician is speaking: "And so our city continues to prosper as industry and labor move ahead in the future hand in hand" From behind some potted shrubs, what apparently is a body wrapped in canvas

is rolled out, falls off the platform and splashes into the river. An observer standing nearby grabs a presiding official by the shoulder. "Did I just see what I thought I saw?" he asks. "No," replies the official, "you didn't. It was nothing at all. A union fellow. He just got all balled up with some pretty heavy regulations." " You mean he ran afould of sick regulations? In that case, he asked for it and he got it."

That is, of course, not preciesely what happened in the case at bar. However, it is close enough to what happened—as an analogy, at least—to help us appreciate the disproportion, the unfairness and the outright inhumanity of the City adminsitration's action taken against Bruno.

They couldn't break the union, so they broke the union leader.

It was unfair and unsupported by any honest evidence for Superintendent Parsons to find Officer Bruno guilty of violating Police Department sick regulations. Moreover, it was manifestly unjust for the Superintendent to dismiss him from the department for such alleged violations. And it was error for the Civil Service Commission to uphold these actions.

In my judgment, this case from the outset was a fraudulent contraption, the sole object of which was to ensnare and punish a police officer in disfavor with the City administration. What motivates officials who so casually allow such an injustice to occur? Is it because the City employee who is being drawn and quartered is sufficiently lower than they are on the totem pole that they feel the

press will take no notice?

Our court system is just where this easily perceivable kind of raildroad job finally should have been recognized and stopped. But it didn't happen that way. Perhaps it's just a case of the herd mentality with each participant merely doing what everyone befoe him did. Or perhaps there now exists in New Orleans some kind of secret officials' club whose members wink at a case like this as they press the button which drops the City employee down through the trap door. Well, if there is a club like this I won't belong to it.

I dissent.

ON REHEARING

We granted rehearing in this case ot reconsider appellant Bruno's challenge to the constitutionality of the New Orleans Police Department's sick leave regulations in light of the recently decided case of *Pienta v. Village of Schaumburg*, 710 F.2d 1258 (7th Cir.1983), which held sick leave regulations similar to those involved in the present case to be violative of several fundamental rights. Being neither persuaded as to the soundness of that decision nor convinced of its applicability to the case at bar, we reaffirm the trial court's judgment.

In *Pienta*, three officers of the Village of Schaumburn Police Department filed a civil action seeking declaratory and injunctive relief to prevent the enformcement of departmental regulations which confined police employees to their residences while on sick leave. Such officers were allowed to leave home only for specific

necessities, i.e., "to go to a hospital, or visit a doctor or secure medicine." Absences were to be preceded by notice to the communications officer as to the name and address of the doctor (or the hospital or drugstore) visited by the infirm policeman. The regulations also required those on sick leave to secure authorization from the Chief of Police before changing their place of recuperation or leaving the state.

In affirming the lower court's injunction, the federal court of appeal held that the regulations in questio infringed upon several fundamental rights, among them, the right to vote, *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); the right to travel, *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); freedom of religion, *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); and freedom of association, *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). *Pienta*, supra, at 1260.

Finding these fundamental rights to be implicated, the *Pienta* court required the state to justify the regulations by proving them to be necessary to a compelling state interest. *Elrod v. Bruns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). The court held that the defendants' stated interest in "avoiding abuse of the liberal sick leave policy and protecting the public fisc; efficiently allocating manpower by fostering an expeditious return to work and requiring those on leave to stay home by the phone in case they are needed; and maintaining the morale of those who must fill in for those on leave, do not rise to the level of compelling interest." *Pienta*, supra, at 1260.

Pienta held, further, that the regulations were unnecessary to the accomplishment of the above-asserted in-

terests, and that less restrictive methods were available to the department to prevent policemens' malingering and the takin gof unjustified sick leave.

Accordingly, the court found the regulations to be unconstitutional and enjoined their enforcement.

We do not subscribe to *Pienta*'s analysis of the constitutional issues. It is frequently the case that when a statutue or regulation is challenged as an abridgment of constitutional rights, the level of scrutiny applied by the reviewing court determines the outcome. As Professor Gunther has noted, scrutiny which is strict in theory is assuredly fatal in fact. See Gunther, The Supreme Court 1971 Term—Forword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 Harv.L.Rec. 1, 8 (1972).

Pienta erred in relying upon *Elrod v. Bruns,* supra, for the proposition that such regulations as these must stand the test of strict scrutiny. To the contrary, the combined effect of *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and *Kelley v. Johnson,* 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976) and their progeny requires a more lenient standard of review.

In *Burns*, supra, the Supreme Court struck down the political patronage system in the Cook County, Ill. Sheriff's Office. According to that scheme of favoritism, it had been the practice of the sheriff, when he assumed office from a sheriff of a different political party, to replace non-civil-service employees of the sheriff's office with members of his own party. The *Burns* plaintiffs were among those

who had been fired solely because they refused to become Democrats in accordance with the newly-elected Sheriff's own party affiliation.

The Supreme Court , in affirming injunctive relief, held the Cook County patronage system to be a "severe restriction" of political belief and association which lie at "the core of activities protected by the First Amendment" Id. 427 U.S. at 356, 96 S.Ct. at 2681. The Cook County employees were coerced to hold beliefs that they did not truly espouse, and to politically associate with those in whom they reposed no political faith.

The patronage system was thus viewed by the Court as an attack upon "association and belief *per se*", not merely conduct. Id. at 363, n. 17, 96 S.Ct. at 2685, n. 17. Such practices, the Court held, infected the political process itself and subverted " 'the deeper traditions of democracy embodied in the First Amendment. *Illinois State Employees Union and Lewis*, 473 F.2d [561] at 576 [(7th Cir.1972)].' " Id. at 357, 96 S.Ct at 2682.

In analyzing the constitutional claim, the Court recognized that "[i]t is firmly established that a *significant* impairment of First Amendment rights must survive strict scrutiny," Id. at 362, 96 S.Ct. at 2684. (Emphasis added).

It is readily apparent that *Burns* is distinguishable from the case at bar, and that the considerations which made strict scrutiny appropriate to that case are nowhere to be found here.

First, *Burns* did *not* hold, as *Pienta* seems to say, that any infringement upon fundamental rights, however

slight and indirect, gives cause for strict scrutiny—rather, it is "a significant impairment" of fundamental rights which has that effect. Thus, no matter how tidy the mechanical distinctions between "strict scrutiny" and "mere rationality", we cannot escape making judgments of degree. *Pienta* is unwilling to admit that.

There is further reason to reject the application of *Burns* to this case. the patronage system at work in Cook County was a direct assault upon association *per se*; the police sick leave regulations are not. The Cook county system required an employee's false association with those whom he politically opposed, and in doing so, sought to invade the political mind; the police sick leave regulations do neither. In *Burns*, the patronage system as a whole was held to be a substantial threat to the foundations of democracy; that cannot be seriously urged of these police regulations. Finally, the Cook County system posed an absolute bar to a certain kind of association—membership in the Republican Party' the regulations in this case merely tell a police officer, in a inferential way, that if he is too sick to work, his right of association must be exercised at home.

Thus we reject the appellant's argument that *Elrod v. Burns*, supra, governs the level of scrutiny to be applied to these regulations.

In *Pickering v. Board of Education*, 391 U.S. 563, 88 S.CT. 1731, 20 L.Ed.2d 811 (1968), First Amendment rights at least as fundamental as those asserted here were not afforded the shield of strict scrutiny. There, in a pure speech case, a school teacher sought reinstatement after having been fired for writing a letter to the editor criticizing the local school board's handling of certain proposals to raise revenue for the school. The Supreme Court granted

relief, holding that the teacher's free speech interest had been violated by his dismissal. In reviewing the school board's harsh reprisal, the Court did not conduct a "strict in theory, fatal in fact" analysis, but instead, sought to "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 568, 88 S.Ct. at 1734—1735.

The Court's preference for a balancing test rather than strict scrutiny analysis was prompted by its recognition that "the State has interests as an employer in reggualting the speech of its employees that differ significantly from those it possesses in conection with regulation of the speech of the citizenry in general." Id. at 568, 88 S.Ct. at 1734.

The principles announced in *Pickering* apply with equal force today. See *Connick v. Myers*, 461 U.D. 138 S.Ct. 1684, 75 L.Ed.2d 708 (1983). "Even enumerated rights, such as those guaranteed by the First Amendment, are limited by the need for discipline, commensurate with the nature of the organization to which one belongs." *Petrey v. Flaugher*, 505 F.Supp. 1087, at 1091 (E.D.Ky.1981); citing *Brown v. Glimes*,444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980); *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed2d 439 (1974) (military); *Kannistano v. City and County of San Francisco*, 541 F.2d 841 (9th Cir.1976); and *Magri v. Giarrusso*, 379 F.Supp. 353 (E.D.La.1974) (police).

In *Kelley v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976) the Supreme Court, applying a "mere

rationality" standard of review, affirmed the right of a police department to regulation its officers' hair length. Proceeding from *Pickering*, supra, the Court emphasized that the plaintiff challenging the hair regulation was not merely a public employee, but beyond that, a policeman. Police regulations which affect general liberty interests, the Court held, cannot be viewed in isolation, but must be measured within the context of the police force's chosen mode of organization.

Kelley recognized that such choices ar entitled to the same presumption of validity as legislative choices designed to promote aims within the scope of the State's police power. "Thus, the question is not...whether the State can 'establish' a 'genuine public need' for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property." Id. at 247, 96 S.Ct. at 1446.

Having organized its police force according to a quasi-military model, the police department was entitled to deference in its decision to require military haircuts, at least in the absence of some showing by the plaintiff that the regulations were irrational.

Several courts have held, for the reasons expressed in *Kelley*, that police sick leave regulations such as those in question today need not stand the test of strict scrutiny.

Vorbeck v. Schnicker, 660 F.2d 1260 (8 Cir.1981), held that police regulations which proscribed leaving the city for a period of 24 hours without first having obtained the

permission of the commanding officer, and which prohibited an officer from leaving his residence or place of confinement while on the sick list except to obtain medical treatment or attention, were subject to "mere rationality" review, citing *Kelley*, supra.

In affirming the district court's dismissal of the plaintiffs' claims, the *Vorbeck* majority held that in the absence of plaintiffs' showing specific instances of irrational *application* of the sick leave regulations, the case was non-justiciable. By necessary implication, regulations were held to be constitutional on their face. In a concurring opinion, it was stated:

> I would affirm the judgment of the district court dismissing on its merits the claims of facial unconstitutionality. A state may demand of its police officers a more exacting standard of conduct than it could validly impose by criminal statutue on citizens in general...I would hold the regulations valid on their face, without prejudice, of course, to any later claim that they may be invalid as applied to particular persons or situations. (Arnold, J. concurring at 1267).

In *Loughran v. Codd*, 432 F.Supp. 259 (E.D.N.Y.1976), the court rejected a policeman's challenge to regulations which, in all material respects, are identical to those before the bar. There, as here, the plaintiff contended that *Kelley*, does not govern in cases where there is an assertion of fundamental rights. *Loughran* rejected that contention, and correctly noted that for the purpose of decision, *Kelley* elevated the plaintiff's asserted right to the status of a liberty interest within the Fourteenth Amendment, but nevertheless applied a "mere rationality" standard of review—because the plaintiff was a *police officer* whose department has chosen to organize itself along paramilitary lines.

Loughran found the questioned sick leave regulations to be a reasonable means to eliminate "gold bricking" and sick leave abuse, thereby ensuring the each officer carried his fair share of the work load. The regulations thus promoted discipline and morale within the police department, and accordingly, they were upheld as facially valid.

Earlier, in *Gissi v. Codd*, 391 F.Supp. 1333 (E.D.N.Y.1974), a policeman, bound by sick leave regulations similar to those which applied to appellant Bruno, moved to enjoin their enforcement, contending that the regulations were unconstitutional. The court declined to rule upon the broad question of facial validity, but noted that "[s]ome restrictions of the activity of a man on sick leave are justifiable in order to prevent malingering or abuse. The Police Department should be in a position to verify whether plaintiff's absence from his residence is for a legitimate purpose and consistent with his claim of total disability to perform even restricted duty." ID. at 1336.

The *Gissi* court granted injunctive relief, however, finding tht *as applied to the plaintiff,* who had asserted *reasonably necessary* grounds for absence from home—the need to visit his children under a court decree allowing visitation every other Sunday—the regulation was irrational and arbitrary. *Gissi* is therefore the case of which *Vorbeck v. Schnicker*, supra, spoke when it stated that "the rules, if carried to their limits, *might* be enforced as to unreasonably restrict the police officers' constitutional rights." Id. at 1264 (Empahsis in original).

[4,5] The summation of the preceeding cases yields these principles: first, that police regulations, when viewed within the context of a department that has chosen to

organize itself along paramilitary lines, are entitled to the same presumption of validity as a State's legislative choices concerning the exercise of its police power; second, that such choices will be sustained unless shown to be arbitrary and irrational; third, that police sick leave regulations which restrict the travel of a convelescing police officer are not arbitrary and irrational *per se*; and finally, that because such regulations are not beyond unreasonable and arbitrary *application*, where they *are* applied in such a manner, the regulations will be enjoined.

[6] Regrading the facial validity of the regulations challenged by Officer Bruno, we, as *Loughran*, find such regulations to be rationally related to the maintenance of discipline and morale within the New Orleans Police Department. Those are indeed *compelling* interests in a city whose population and police force are as sizeable as New Orleans'. The regulations at issue further discipline and morale by ensuring that policemen do not regard sick leave as the equivalent of a vacation at fully pay. Each officer is thereby encouraged to pull his fair share of the load, and to report "sick" only when he is truly incapable of performing any police duty. The department's choice to regard paid sick leave as something other than paid vacation is one that is eminently rational. We therfore find the regulations to be constitutional on their face.

[7] With reference to Officer Bruno's "as applied" challenge, the facts of this case, as set out in our original opinion, admit no doubt that the regulations were neither arbitrarily nor unreasonably applied to the appellant. We are not faced with a situation where, as in *Gissi v. Codd*, supra, a reasonable claim of necessity dictates an exception to the general rule, or where "going by the book" causes an

injustice. To the contrary, the great injustice in this case is in Officer Bruno's conduct.

Nor have the regulations been enforced against the appellant in a discriminatory manner. As we originally noted, other policemen have been disciplined by the department for far less flagrant abuse of sick leave.

For the reasons assigned, we find the sick leave regulations disputed in this case to be constitutional on their face and as applied. Our original opinion is reinstated.

AFFIRMED

GARRISON, Judge, dissenting.

I

The Man Who Stole Mardi Gras

> "And yet you continued to be actively engaged in union activities, you went out of town on at leas three occasions, to Detroit, New York and Florida on union business, and you attended at least two union meetings and you spoke to the Krewe of Endymion concerning possible police action..."[1]

This case appears to me to involve the officially sponsored railroading of a veteran police officer of many years' service. It grows out of a classic union-busting effort of a kind rarely seen in present day city administrations. At another level, the case addresses itself to the elaborate use of the machinery of justice to accomplish injustice.

Specifically, the case concerns the dismissal of Of-

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[1] Cross-examination of Officer Bruno at Civil Service Commission hearing. Page 85. Transcript II.

ficer Vincent Bruno supposedly for violation of "police department sick leave regulations." Officer Bruno had thirteen years of service and was well on his way towards earning a sixteen-year retirement—that lure which was established during the postwar years to bring into the police department men who otherwise might not have joined

Ordinarily, the fact that an officer had many years of service, and was close to earning his pension, would be cause for some consideration prior to any action against him for an alleged infraction of minor regulations. But this was not the case with regard to Officer Bruno. He was theman who—or so some apparently though—stole Mardi Gras. He was the Grinch who stole Christmas.

For Officer Bruno was the leader of the police union when it struck against the City of New Orleans. As the result of this police strike Mardi Gras was cancelled for the first time since World War II.[2]

From the announced circumstances of Bruno's firing for violation of "sick regulations" by Police Superintendent Parsons, a casual observer might think that little notice had been taken of his police union activities, of the police strike which he led against the City and of the subsequent cancellation of Mardi Gras. A review of this case, however leaves no doubt that the *real* reason for the dismissal of Officer Bruno was his activity as the union leader of the police strike and the closing down of Mardi

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[2] Judicial cognizance, as taken here, is applicble to "...(6)...the facts of history and the political, social and racial conditions prevailing in this state..." R.S. 15:422.

Gras which followed. One additional factor, the joinder of his union with the national AFL-CIO quite apparently determined his actual date of dismissal because he was fired the very next day (see page—hereunder). The allegation that Bruno was fired for violation of any kind of regulation whatsoever, as will be seen, is sheer artifice and a distinct fraud upon our legal system.

The particular union of which Vincent Bruno was the head—and which he was leading at the time of the police strike against the City—was the Police Association of New Orleans (PANO). The cancellation of Mardi Gras by the City administration fell on February 27, 1979.

It is rather hard not to notice that in March, 1979, the City Finance Officer informed that union, among other organizations, that the City was going to end its practice of taking out payroll deductions, requested by City employees, in the union's behalf. It was announced that these deductions, known as "check-offs", were being stopped by the City because of a reduced budget. This action, had it been successful, could have created an overnight survival problem for the police union, not to mention the others.

The City administration's effort to stop payroll deductionss from going to the police union and other associations soon enough was in the courts, where ultimately it was blocked. But, as the record in the instant case shows, the City's investigation of Officer Bruno was underway by November of 1979, and the results of that Alphonse and Gaston tableau are now before us.

All of this was in the name of good government, of

course. The check-offs for the police union were to be terminated—not because the union had struck against the City of Mardi Gras, but ostensibly because the administration was concerned about budget problems. The thirteen-year police career of theunion leader was to be terminated—not because he had led the police union's strike against the City, but ostensibly because he had problems with his sick leave. Or so it was all publicly explained by administration spokesmen.

However, I cannot blind myself to the true circumstances in which the City, after having attempted to discipline the police union, managed to catch its leader by the heels. When the royal elephant is found missing and the power elite charges its selected suspect with dropping cracker crumbs on the floor, are we really supposed to believe that the local government is frenzied by cracker crumbs on the carpet?

It is plain that the City sought to dispose of the problem of the pesky police union officer by resorting to the cunning and deceitful use of law enformcement machinery—a project in which it succeeded more than I would have thought possible. It is also plain—from the enthusiasm with which they joined in the chase—that once the hunt was underway the pursuers did not lack for official allies in cornering the union leader. A few may have felt unhappy abouy the cancellation of Mardi Gras and a few others mmay have felt unhappy about unions, but they seem to have put aside their personal feelings out of their common devotion to the Police Department's sick leave regulations. Surely, they must have reasoned, a small public hanging might not be out of order for the man who stole Mardi Gras.

The writer, Kafka, makes the point that sometimes those in power are not overly concerned about the existence of actual guilt so long as the proper law enforcement procedures are followed.[3] In any case, the official phalanx rolled smoothly against the leader of the police union. The Police Department finished its part of the case when Superintendent Parsons charged Officer Bruno with violating sick leave regulations (and then, in the same breath, found him guilty). The City Attorney's Office adroitly explained how the top command of the Police Department had managed to crack the case: "During Mr. Bruno's absence from work his superiors suspected that Mr. Bruno was possibly in violation of sick leave regulations."[5]

One can almost sense the impatience with Officer Bruno's plea of innocence at the Civil Service Commission hearing. "...(Bruno) contends that he didn't know of the 1978 sick rule change," an assistant city attorney argued. "Surely, Mr. Bruno, a police officer with thirteen years experience, knows it's his obligation to keep current with the department's rules."[6]

When the government acts ignobly it injures not only the individual who had become its prey. It hurts our

[3] In *The Trial* Joseph K. is arrested but never told the reason for his arrest. At the court he is never told what the charges are. The court chaplain informs him that he will probably be convicted, however he does not know what the charges are either. Ultimately, two formally dressed men arrive at his home to pick him up. He is taken to an abandoned quarry where is is executed.

[4] See March 14, 1980 letter to Bruno from Superintendent Parsons.

[5] City Attorney's Memorandum on Behalf of the Department of Police, filed in connection with the Civil Seryice hearings. Transcript I.

[6] Ibid.

system of laws as well. Many people observe what is actually happening and, not fooled by the attendant protocol and rote of a particular travesty which may be unfolding before them, lose confidence in the entire machinery of justice.

To allow a law enforcement authority to switch a charge to a more convenient accusation is tantamount to encouraging that authority to select the convenient charge at the outset and find the evidence later. It is all very well for the Queen to announce "Sentence first—verdict afterwards,"[7] but in New Orleans the Superintendent of Police cannot do that and neither can the City Administration.

The charges initiated against Officer Bruno plainly were arbitrary, capricious, discriminatory and contrived. In my regard, the majority of this panel—instead of lending credence to such mendacity— should have concluded that it was error for the Civil Service Commission to uphold such obviously false charges.

II

Freedom of Speech

> "No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write or publish his sentiments on all subjects, being responsible for the abuse of that liberty."[8]

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[7] See Chapter 12, *Alice in Wonderland*, by Lewis Carroll.

[8] Louisiana Constitution of 1974, Art. 1 § 7.

The circumstances of the "sick leave violation" charges against Officer Bruno indicate perception that any earlier charges related to his leadership of the police strike might encounter First Amendment problems. Waiting for a distinct time interval, then charging him with an alleged offense off to the side of the picture, clearly was the chosen solution. Thus it came to pass that, some months after the Mardi Gras strike had subsided, Bruno "ran afoul of sick leave regulations."[9] Nevertheless, like Wile E. Coyote having another one of his inventions blow up in his face, Officer Bruno's superiors appear to have run afoul of the First Amendment.

Both the United States and Louisiana Constitutions forbid government actions which have the effect of denying freedom of speech to any individual.[10] I believe that this factor alone should act as a bar to maintaining Officer Bruno's conviction.

Superintendent Parsons' letter to Officer Bruno informed him that he was being terminated for violations which included the following actions without permission:

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[9] This phrase is quoted from Judge Augustine's majority opinion in this case (upholding appellant's dismissal from the police force). Its language suggests that Bruno's sick leave problems simply represented a stroke of bad luck for him, free of any initiation by City officials lacking enthusiasm for his welfare. This theory—which could be called the "open manhole" theory—seems to suggest that there is no point in looking too closely behind the facts inasmuch as everything happens for the best (at least for those employees who know which side their bread is buttered on).

[10] U.S. Constitution, Amendment 1; Louisiana Constitution of 1974, Art. 1 § 7.

"...On December 28, 1979, *you were interviewed at the WWL Studios* located at 1024 North Rampart, New Orleans, Louisiana, by I.J. Hudson." (Emphasis supplied).

"...On January 16, 1980 *you were interviewed by Sally Ann Roberts of WWL-TV away from you place of confinement.*" *(Emphasis supplied).*

"...*On January 22, 1980, you addressed the Krewe of Endymion* at the Fountain Bay Hotel located at 4040 Tulane Avenue, New Orleans, Louisiana." (Emphasis supplied).

"...On February 29, 1980, *you were interviewed at WDSU Studio* at 520 Royal Street, New Orleans, Louisiana" (Empahsis supplied).

"...On March 10, 1980, *you were a guest on a radio talk show for approximately three hours at WSMB Radio Station* located at the Maison Blanche Building at 901 Canal Street, New Orleans, Louisiana." (Emphasis supplied).[11]

The single common factor in each of these *charges* was Officer Bruno's exercise of the right of free speech. Yet a major part of Bruno's job as leader of the police union involved communication by him not only to feelow police officers byt to the public at large. Such systematic conversion of the interchange of ideas into "violations" of departmental regulations could have a chilling effect on future union leaders or on others similarly placed. Superintendent Parsons acted improperly in this regard and the Civil Service Commission committed error in upholding his action.

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[11] Examples from the charges against Officer Bruno from Superintendent Parsons' letter of March 14, 1980. Transcript I.

III

The Police Department's Case

Mr. Martin: How religiously is this book kept?
Sgt. Thompson: I don't know, personally.
Q: You don't keep it up?
A: No Sir, I don't.
Q: Who does?
A: It's the responsibility of the desk officer.
Q: And who does the desk officer work for?
A: He works for the platoon commander
Q: Which is you?
A: Which is myself.
Q: But you don't know whether it's really kept up religiously or not?
A: No.[12]

Even under the Department's official fiction that "sickleave violations" constituted the gravamen of Bruno's offfense, its case at the Civil Service Commission hearings must be regarded as a prosecutorial disaster. Put in terms of a missile launching, it would be fair to say that the missile fell over on the launching pad.

Evidently the attorneys representing the police force assumed that they could show the justification for Superintendent Parsons' dismissal of Officer Bruno by calling the officer as their main witness. However, as some prosecutors might have explained to them in advance, Bruno's testimony was very destructive to the police department's case. It showed, at the outset, that a gulf had developed between Officer Bruno and the police force concerning the interpretation of the key sick regulations involved. It showed, further, that the police department had made no serious

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[12] Pages 142-143, Transcript II.

effort to straighten out this communication problem (which plainly developed after the Mardi Gras strike, inasmuch as Bruno had had health problems for many years while on the force with no sick leave problems of any kind arising).

The testimony demonstrated clearly that the police department's control of procedures maintaining a sick leave log book for checking in and checking out of one's residence ranged from catastrophic to nothing at all. For example, the appellant was asked if he had acted as a judge at a talent contest at Frankie Brent's Lounge in Metairie and he replied in the affirmative. Then, somewhat representative of the entire questioning (this constituting the major part of the City's case), the colloquy developed along the following lines:

Q: You know whether or not you left to attend this contest without notifying the Department?

A: I called the Urban Squad and told them I was going to the address 4724 Utica Street.

Q: You recall who you talked to at that time?

A: No.

Q: But that should be in the sick leave book that's maintained?

A: I didn't know that there was a sick leave log book. I never heard of one.

Q: When someone called you when you were working, to report that they were leaving their home to go to the doctor or the clinic or something (sic), what would you do? How

would you handle that?

A: Write it on a piece of paper and when they called back, throw the piece of paper away.

Q: You never forwarded that information to any of your prosecutors?

A: Never was advised to. I wasn't even aware that there was a log at the Urban Squad or any other Division.[13]

Again, in addition to this representative sample of the absence of support for the sick leave charges he was asked whether he had checked in with the Urban Squad before departing for Detriot (on union business). His answer was: "Well, that's not entirely correct. I notified the Urban Squad office."[14] Asked whether he had given notification before leaving to speak to the Krewe of Endymion at the Fountain Bay hotel, he replied in the affirmative, particularizing that he had talked to the Deputy Chief before he left.[15] Asked if he had given notification before leaving for a PANO meeting in January[16] and before leaving for a fund rasing affair for President Carter[17] his answer continued to indicate that he had.

Asked whether he had given notification before leaving to speak at a February PANO meeting at 315 South Broad Street, he again responded affirmatively.[18] Here, in-

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[13] Pages 52-53, Transcript II.

[14] Page 44, Transcript II.

[15] Page 72, Transcript II.

[16] Page 75, Transcript II.

[17] Page 76, Transcript II.

[18] Page 77, Transcript II.

cidentally, he was asked whether he had given a news conference at PANO, and he replied that he had.[19] Bruno's allowing of news coverage makes apparent the fact that his allegedly incriminating activity was entirely open and aboveboard.

At no time in Officer Bruno's career, the testimony showed, had he been cautioned, warned or disciplined regarding sick leave abuse until shortly before his termination. At no time during Officer Bruno's illness did any person from the Department of Police inform or caution him regarding his methods of reporting departures from and returns to hsi place of confinement.

The Department of Police failed to establish that Officer Bruno at any time was advised either verbally or in writing that he was abusing the Department's sick leave policy. Officer Bruno testified, and other testimony corroborated, that he had sought to work out his physical and psychological problems in such a way that he would not be breaking Department rules nor interfering with the orderly functioning of the Department. Indeed, the record makes it notably clear that he—and not the Department—was the sole protagonist in that effort.

Even though these examples of deteriorating charges were selected at random, they show how the police department's case died aborning. And that's the way it went with regard to the effort to show that Officer Bruno systematically failed to inform the Urban Squad before he went somewhere. In instance after instance, the testimony showed that either he had notified the squad or the records could not be found.

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[19] Page 78, Transcript II.

A-68

The Drones Club

The New Orleans Police Department is generally represented, and justifiably so it would appear, as one of the better police departments in the country. In recent years the law enforcement record with regard to crimes of high priority has been good.

However, the portions of the transcript just referred to make it plain that the dissemination of sick leave information and the maintenance of sick leave records are another matter. As to the efficiency of that operation, its responsiveness to sick leave problems was reminiscent of the Drones Club, that hallowed institution of P.G. Wodehouse, following a pleasant lunch, with most of its members asleep or falling asleep. "Did old Bruno ever call today?" one member might ask. "Someone called," might be the reply. "Can't remember his name."

Various documents produced by the Department of Police purported to contain all records of sick leave exercised within the Urban Squad. In particular, there was produced the log book in which compliance with sick leave requirements presumably was recorded. However, all testimony by those Police Department personnel who were personally acquainted with the keeping of this book, actually indicated that this "call-in, call-out" book was infrequently used and reflected only a fraction of those notations one would expect to find if the Duty Officer properly recorded there all the messages regarding sick leave rules compliance. Captain Richard Martin testified that although he had been in charge of the Patrol Division for many years, had been a District Commander and was presently the Commander off the House of Detention, he

had never seen a "call-in, call-out" book before, such as was produced at the hearing of this matter before the Hearing Examiner.

Officer Bruno testified that at all times required he called his place of assignment, the Urban Squad office, in every instance when he was returning to or departing from his place of confinement. He testified that it was his intention throughout the period to abide by the rules and regulations. For this reason, he testified he had consulted with his immediate supervisor, Lieutenant Rinal Martin, Deputy Chief Duke, the City Chief Administrative Officer, Reynard Rochon, and the Health Service Section of the Department of Police.

With regard to medical testimony, the only such evidence was introduced by Officer Bruno. He called as a witness a personal physician, Dr. Harry Philibert, who testified concerning the heart condition which Bruno has had for many years and which was documented in the record.[20] No one from the Police Department appeard to rebut such evidence as to Bruno's physical capabilities.

Captain Martin said that, had he known of Bruno's need for sick leave, he would have acted at the first indication. Specifically, he testified, he would have called Bruno to his office as his commanding officer to discuss the situation with him and possibly could have advised Bruno of any possible hazard of violation of sick leave regulations at that time. Chief Parsons, also, admitted on the witness

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[20] Officer Bruno, as the Police Department's personnel file showed, was retired from the National Guard active service in 1966 for a heart defect, the very same defect which has from time to time resulted in episodes of paroxysmal tachycardia which render Bruno temorarily disabled.

stand that had he seen the initial card filed on October 21, 1979, he would have tried to do something about it at the time. The Department did not contest the fact that Officer Bruno was in fact sick and theonly testimony before the commission in this regard is that of Dr. Harry Philibert, who was offered both as Bruno's personal physician and as an expert.

Bruno never disobeyed any direct orders from his superiors throughout the course of his activities. He was never advised, cautioned nor otherwise notified of Department dissatisfaction with his conduct until very shortly before his precipitous termination.

His pleas for assistance with his medical and personal problems, both within the Department chain of command and to City officers, were met with indifference or hostility. Early on he made an unsuccessful effort to communicate with Deputy Chief Duke. On January 12, 1980, Bruno met the City's Chief Administrative Officer, Reynard Rochon, at a downtown hotel to discuss Bruno's union activities and the seeming impropriety of conducting such activities while on sick leave. Bruno asked Rochon to intercede on his behalf so that he might be placed on retroactive annual leave and thereby be relieved from the sick leave regulations. However, no action was taken.

There is nothing in the record to indicate that the appellant has ever been accused of any act by the New Orleans Police Department which could be described as immoral or illegal. During his absence from duty due to illness, this officer appears to have obeyed orders directed to him to the best of his ability and to the extent that his medical condition would safely permit. He was not accused

of acting in concert with other officers so as to create a manpower shortage by abusing sick leave.

This string of samples from the Civil Service Commission hearing serves to confirm that the case against Officer Bruno was a sham. If it hadn't been obvious before, it became obvious at the hearing. District attorneys, when a case falls apart during its presentation in court, learn simply to abandon prosecution and go on to the next case. However, there was no next case here and the leader of the Mardi Gras police strike was the target.

This extensive, even prolonged perhaps, recapitulation of the evidence from the hearing makes it clear that Officer Bruno was not guilty of the charges mounted against him. More than that, it indicates what Bruno really did not have to prove: that he was innocent of these charges.

How sharper than a serpent's tooth is a police superintendent, already harassed by the many problems of running a police force, who has been humiliated before all the world by the leader of a police union. To have maintained any semblance of fairness, the man most embarrassed by Bruno's Mardi Gras strike should not have been the judge and jury dismissing him from the force.

IV

Crime and Punishment

Martin: Did this *March 14,* 1980 dismissal (of Officer Bruno from the police force) have any relation with the fact that approximately on *March 11* PANO announced their affiliation with the AFL-CIO?

Parsons: No, sir.

Martin: Just coincidence?

Parsons: Just coincidence. (Emphasis added).[21]

The appellant is a most unlikely candidate to have been targeted as the great scoff-law of departmental regulations. In his thirteen years as a police officer he was never accused of violating a single on-duty regulation. How strange it was that his long hidden tendency to fall afoul of regulations apparently did not reveal itself until he became head of the police union—and, even then, only after the cancellation of Mardi Gras.

And how strange it was, too, when he finally was found guilty of violating the sick leave regulations, that the punishment was so explosively disproportionate. He was sent rattling down the chute, exiled for all time from the world he had been part of for so many years, dismissed from the police force he had served long and well. Why, one has to ask, was he not given instead a suspension or a fine? Why was there no moderation of any kind? Quite obviously the answer is: because Officer Bruno was being punished, for his actions as the leader of the police union.

On *March 13,*, 1980, PANO was granted its local AFL-CIO charter out of Washington, D.C.

On *March 14*, 1980—the following day-Parsons wrote Officer Bruno informing him that he was discharged from

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[21] Martin is Clyde P. Martin, Bruno's attorney at the Civil Service hearing. Parson is Superintendent of Police James Parsons. This excerpt is from page 374-375 of Transcript III.

the police force.[22]

At the time of being fired, Bruno was returning from Washington with a new AFL-CIO charter for his union. That's the way it really went down. Before the camouflage was set up and made the facts harder for the people to see, this is how Bruno was disposed of for doing his police work perhaps not wisely but too well.

So what of the much vaunted "crime of the century", the official charge that Bruno "violated police sick leave regulations"? The simple truth is that this piece of bureaucratic deception had about as much to do with reality as the proverbial flowers that bloom in the spring.

I am mystified that the other judges on this panel have been unable to see and recognize so transparent a railroading as was done to this particular City employee. In the face of the astonishing facts surrounding his abrupt dismissal immediately after the AFL—CIO incident how can they, I ask myself, act as if this is a mtter concerning sick leave regulations?

Indeed, one of the indicators, early on, that the whole "sick regulations" tableau had been untrue lay in the incredibly disproportionate sentence dropped on Bruno's head. So harsh a sentence for such a relatively minor infraction underscores the actual motivation behind the ersatz investigation and previously determined conviction of the police union leader.

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[22] Under the circumstances, this abrupt dismissal hardly meets the test of not being "arbitrary, capricious or discriminatory." See: *Jones v. Louisiana Department of Highways*, 259 La. 329, 250 So.2d 356, 359 (1971).

For example, there are laws against jaywalking but we don't mash violators into the asphalt with steamrollers in order to discourage future jaywalkers. There are even laws against removing labels from polyester mattresses and pillows, but we don't drag violators through the streets in chains. Perhaps, however, the extremity of the sentence served to direct attention to what was being accomplished behind the artful diversion.

And art there was in the City's chronicle of Bruno's supposedly inculpatory activity. The recitation of so-called "violations" committed by Bruno, for example, consists of an accumulation of activities not unusual for a union leader—but activities which predictably must appear to the public, with its preconceived image of police work, as outrageous for a policeman.

However, Officer Bruno had simply been doing all along what his union responsibilities required that he do—obtaining publicity for the union as its head—and what his superiors plainly could anticipate that he would continue to do. And, as the record indicates, this arrangement obviously had more than satisfied the Police Department's high command and the City administration—at least, prior to the Mardi Gras strike and the subsequent betrothal of Bruno's union to the AFL-CIO.

By presenting such seemingly breezy interludes as being sinister when performed by a policeman (e.g., "addressing a Mardi Gras krewe" or "attending a fund raiser for President Carter" or "giving a radio interview for three hours") the effect was accomplished of making the police union officer look irresponsible, even flip, to the public. He "asked for it," so the reasoning would go, "and he got it."

It must have made it all the easier, when the time came, to roll him out of the way.

Visualize, if you will, a scene: A raised platoform alongside the river. The band is playing as a new addition to the New Orleans skyline is topped off. Colored balloons are floated off into the sky. A politician is speaking: "And so our city continues to prosper as industry and labor move ahead into the future hand in hand." From behind some potted shrubs, what apparently is a body wrapped in canvas is rolled out, falls off the platform and splashes into the river. An observer standing nearby grabs a presiding official by the shoulder. "Did I see what I thought I saw?" he asks. "No," replies the official, "you didn't. It was nothing at all. A union fellow. He just got all balled up with some pretty heavy regulations." "You mean he ran afoul of sick regulations? In that case, he asked for it and he got it."

That is, of course, not precisely what happended in the case at bar. However, it is close enough to what happened—as an analogy, at least—to help us appreciate the disproportion, the unfairness and the outright inhumanity of the City administration's action taken against Bruno.

They couldn't break the union, so they broke the union leader.

It was unfair and unsupported by any honest evidence for Superintendent Parsons to find Officer Bruno guilty of violating Police Department sick regulations. Moreover, it was manifestly unjust for the Superintendent to dismiss him from the Department for such alleged violations. And it was error for the Civil Service Commission to

uphold these actions.

In my judgment, this case from the outset was a fraudulent contraption, the sole object to which was to ensnare and punish a police union officer in disfavor with the City administration. What motivates officials who so casually allow such an injustice to occur? Is it because the City employee who is being drawn and quartered is sufficiently lower than they are on the totem pole that they feel the press will take no notice?

Our court system is just where this easily preceivable kind of railroad job finally should have been recognized and stopped. But it didn't happen that way. Perhaps it's just a case of the herd mentality with each participant merely doing what everyone before him did. Or perhaps there now exists in New Orleans some kind of secret officials' club whose members wink at a case like this as they press the button which drops the City employee down through the trap door. Well, if there is a club like this, I won't belong to it.

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It is also noted that, with regard to the N.O.P.D. sick leave regulations, the holding of the U.S. Court of Appeal 7th Circuit, in *Pienta v. Village of Schaumburg, Illinois*, 710 F.2d 1258 (7th Cir., 1983), appears to be applicable. As to sick leave, the police regulation in *Pienta* is virtually identical to that in the present case. The regulation in *Pienta* provided as follows:

> "General Order No. 79-59, Schaumburg Police Department Standard Operating Procedure Code A-35.2 (Injuries on Duty)
>
> I.F. Absence from Home:

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2. Employees on injury leave must remain at their residence at all times except for matters that relate to their injury. (Exception: hospitalized personnel). Each time it is necessary for an employee to leave their (sic) residence to go to a hospital, or visit a doctor or secure medicaine, they must notify the Schaumburg Police Department Communications Section and leave notice with the Communications officer as to the doctor's name and address that they are going to visit (hospital, drug store, etc.). Upon returning home, they will again notify the Communications Seciton by phone of their return.

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I.G. Personnel on injury leave will not change their place of recuperation or leave the state without authorization from the Chief of Police.

Administrative General Order No. 79-9, Schaumburg Police Department. Standard Operating Produre A-24 (Sick Time).

I. SICK TIME

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B. It shall be the responsibility of all personnel reporting sick to remain at their residences until their next scheduled tour of duty, (exception—if a scheduled day off immediately follows a sick day, the residency requirement will end at 000 1 hours on the scheduled day off), unless they must go to a hospital or visit their doctor or secure medicine for their illness. However, if any personnel must leave their

residence during their sick period, it shall be their responsibility to notify the Schaumburg Police Department Communications Section and leave notice with the Communications officer as to the doctor's name and address that they are going to visit, drug store, hospital, etc., and they will notify the Communications officer upon their return to their residence.

C. Personnel on sick leave will not change their place of recuperation or leave the state without authorization from the Chief of Police.

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I. The Administrative Division Commander with the approval of the Chief of Police may grant personnel stricken with serious illness or injury permission to leave their residence during the period of recuperation without requiring notification to the Police Department (i.e., heart attacks, major operations, broken limbs or serious injuries)." (AT 1262).

In *Pienta*, the Seventh Circuit Court of Appeal stated:

"In effect, these regulations put plaintiffs under house arrest until their return to work. Their rights to vote, to exercise freely their religion by church attendance, to go to court, to attend political or family gatherings, and to travel were infringed. See, e.g.*Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (vote); *Abington School District v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed2d 844 (religion); *Shapiro v. Thompson*, 394 U.S. 618,

629, 89 S.Ct. 1322, 1328, 22 L.Ed.2d 600 (travel); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.ed.2d 405 (association). See also *Gissi v. Codd*, 391 F.Supp. 1333 (E.D.N.Y1974) (in similar circumstances, plaintiff has right to visit attorney when necessary, and visit children at leas once every two weeks). Since these regulations prohibit the exercise of constitutional rights, plaintiffs have standing to challenge them without attempting to disobey. *Muller v. Conlisk*, 429 F.2d 901, 903 (7th Cir.1970). Defendants apparently concede that the regulations infringe some of plaintiff's constitutional rights. They argue, however, that the rights infringed are not absolute, and *that state regulation of the rights of a public employee must be evaluated under the rational basis test* of *Kelley v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708. This court has already held that the test to be applied in determining the constitutionality of a government regulation of a public employee depends on the nature of the right affects. *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266 (7th Cir.1976), certiorari denied, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632. If a plaintiff's claim is grounded solely in the gernal liberty language of the due process clause as in *Kelley, supra*, the state need only demonstrate a rational relaticnship between the regulation and a legitimate state interest. If the public employee challenges limitations on rights specifically protected by other parts of the Constitution, the state must demonstrate that the regulation is necessitated by a *compelling state interest* and is narrowly tailored to meet that objective. *Suscy*, supra; contra, *Loughran v. Codd*, 432 F.Supp. 259, 263 (E.D.N.Y.1976) (applying rational basis test to police regulation).

Because several of the rights infringed by the regulations are protected by specific provisions of the Bill of Rights, defendants must demonstrate a compelling state interest to justify the regulations. See *Elrod v. Burns*, 427 U.S. 347, 362-363, 96 S.Ct 2673, 2684, 49 L.Ed.2d 547. Defendants' stated interests in avioding abuse of the liberal sick leave policy and protecting the public fisc; efficiently allocating manpower by fostering an expeditious return to work and requiring those on leave to stay by the phone in case they are needed; and maintaining the morale of those who must fill in for those on leave, do not rise to the level of compelling interests. In addition, these interests can surely be achieved without a blanket prohibition on plaintiff's freedom of movement[3]

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"Finally, *even under the rational basis test* these regulations are of questionable validity. Defendants' basic argument is that an employee who is too sick or injured to report even for restricted duty is by definition too sick or injured to leave the house for any purpose—to go to court, to church, to a polling place, to a family picnic, or to respond to an emergency call on a personal matter. Yet an employee injured with a broken arm may not be able to report even for restricted duty desk jobs, but he is perfectly able to go to church or to court on a parking ticket. An employee with the flu may not qualify even for restricted duty but is perfectly able to leave the house to leave

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[3] According to the Police Executive Research Forum and Police Foundation, Survey of Police Operations and Administrative Practices, Ch.9, p. 67 (1981), cited by plaintiffs (Br. 10), *90%* of the nation's police departments do not confine their employees to their homes during sick or injury leave." (AT 1259-1262) (emphasis added).

if she gets sick or injured and suddenly has to come home. In addition, enforcement of the policy will not necessarily serve the Department's stated purpose of preventing abuse so as to save money and conserve manpower. Because the regulations do not require a doctor's cetificate for sick leave for less than three days, for example, the dishonest employee can feign illness for such time and simply collect sick pay as long as he stays in his home. The "stay at home" requirement thus has no relation to the medical needs of the individual employee, and as such, has no relation to the legitimate interest of the Department in preventing abuse. In fact, the sick leave regulation grants the Chief of Police, rather than a medical officer, the power to permit employees to leave their homes without requiring notification to the Department! *Ct. Loughran v. Codd, supra*, 432 F.Supp. at 261 (district surgeon had power to decide whether and to what extent home confinement appropriate).

Of course, a municipal police department has a legitimate interest in handling sick and injury relief policies to assure the ability to carry out its public services. Some restrictions on the activities of an employee on leave are justifiable, and the Department should be entitled to verify whether an employee's absence from home is consistent with a claim of disability. See *Gissi v. Codd, supra* 391 F.Supp. at 1336. Here however, the two challenged regulations go too far in infringing on established constitutional rights.

In conclusion, I find, just as did the 7th Circuit, that the regulation fails to meet the compelling state interests test, that no realistic relationship exists between the regulation and the efficient operation of the N.O.P.D., that

the regulation additionally fails to meet the rational basis tests such that it is unconstitutionally overbroad and should be declared void.

Accordingly, I believe that Officer Bruno should be reinstated with full rank, privileges and other emoluments of office.

For the foregoing reasons, I dissent.

APPENDIX D

Vincent J. BRUNO

v.

DEPARTMENT OF POLICE

No. 84-C-1294

Supreme Court of Louisiana

Jan. 14, 1985

Appeal was taken from an order of city civil service commission affirming dismissal of officer from police department for having violated departmental regulations governing conduct of police officers while on sick leave. The Court of Appeal, 451 So.2d. 1082, affirmed, and appeal was taken. The Supreme Court, Watson J., held that (1)the Court of Appeal erred in affirming the commission on the basis of officer's violation of regulation of which he was not notified inhis letter of termination, and (2) officer's flagrant violations of regulation pertaining to sick leave justified his discharge.

Affirmed.

Marcus J., dissented.

Calogero, J. dissented in part and filed statement.

John Levy, Laplace, John H. Brooks, Gretna, Frank DeSalvo, New Orleans, for applicant.

Salvador Anzelmo, City Atty., Bruce E. Naccari, Asst. City Atty., Bernette J. Johnson, Deputy City Atty., for defendants-respondents.

WATSON, Justice.

Plaintiff, Vincent J. Bruno, is contesting his discharge as a civil service employee of the New Orleans Police Department. After the Civil Service Commission upheld his dismissal, Bruno appealed to the Fourth Circuit Court of Appeal, which affirmed the Commission, with one judge dissenting.[1] A writ was granted to review the judgment.[2]

While serving as a police officer assinged to the Urban Squad, Bruno also held a union office, being president of the Policeman's Association of New Orleans (PANO). However, the reasons for his discharge outlined in the Superintendent's letter of termination dated March 14, 1980, were unrelated to Bruno's union activities. He was charged with:

(1) violation of ASOP 75.2,[3] relating to sick leave regulations;

(2) violation of Rule 4, paragraph 2,[4] in refusing

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[1] *Bruno v. Department of Police*, 451 So.2d 1082 (La. App. 4 Cir.1984).

[2] 457 So.2d 1184 (La., 1984).

[3] "A sick leave period commences at the time the member notifies the Desk Officer. A member on sick leave shall remain in his residence or other approved place of confinement for the entire sick leave period, except to visit a physician, hospital, clinic, purchase meals or purchase medicine. The member shall notify his Unit of assignment before leaving and upon returning from such a visit (exceptions below). If the member is assigned to a unit that is not open on a 24 hour basis, notification shall be made by telephone to Health Services Section or that section's Code-A-Phone." (Appellant Exhibit A)

[4] "A member shall professionally, promptly, and fullv abide by or execute instructions issued from any authoritative

to obey a lawful instruction to return to work; and

(3) violation of Civil Service Rule IX § 1.1 by being unable or unwilling to perform the duties of his position.

Bruno allegedly violated these regulations between October 21, 1979 and March 10, 1980.

The Civil Service Commission concluded that the City carried its burden of proving that Bruno did not report absences from his place of confinement and that the reasons for his absences were not those allowed by ASOP

(footnote 4 continued)
source. If the instructions are reasonably believed to be in conflict with the Rules and Procedures of the Department or other issued instructions, this fact shall respectfully be made known to the issuing authority. If the issuing authority elects to insist upon execution of the instructions which are reasonably believed to be in conflict with Department Rules and Procedures, then the member receiving the instructions shall have the right to request and is entitled to receive, IMMEDIATELY, said instructions in writing, except as determined by the supervisor. The issuing authority shall be held responsible should any conflict materialize; however, no instructions shall be issued or executed which are in violation of law." (Appellant Exhibit A)

5 "Section 1. MAINTAINING STANDARDS OF SERVICE 1.1 When any regular employee in the classified service is unable or unwilling to perform the duties of his position is a satisfactory manner or has committed any act to the prejudice of the service, or has omitted to perform, or otherwise has become subject to corrective action, the appointing authority shall take action warranted by the circumstances to maintain the standards of effective service. The action may extend to (1) removal from the service, (2) retirement, (3) reduction in pay to the next lower rate in the range for the class, (4) demotion to any position by the appointing authority and the Director to be competent to fill, (5) suspension without pay not exceeding in the aggregate one hundred twenty (120) days in any period of twelve (12) consecutive calendar months, (6) fine. (as amended February 9, 1955 and August 9, 1979)." (Appellant Exhibit A)

75.2. The Commission did not deal with the charge of disobeying an order but did question whether Bruno was actually ill during the entire period from October 21, 1979 to March 14, 1980.

The Court of Appeal concluded that Bruno had violated D.R. 630-3, paragraph 9, as modified on October 25, 1978, by not receiving departmental permission through the chain of command for leaving his place of confinement.[6] However, violation of this regulation is not specified in the letter of termination which was sent to Bruno by Superintendent Parsons.

LSA-RS. 33:2423 provides in pertinent part:

> "In every case of removal or reduction in pay of any employee in a competitive position in the classified service or of involuntary retirement or demotion of the employee, the appointing authority shall furnish the employee and the director a statement in writing of the reasons therefor."

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[6] D.R. 630-3, paragraph 9, formerly provided:

"Employees on extended sick leave, for an illness or any injury, may arrange for advance approval from the Medical Section for activities related to continued treatment, convalescence and rehabilitation so that notification of each instances of leaving the place of confinement will not be necessary."

On October 25, 1978, this regulation was modified to state:

"An employee who has permission from his attending physician to leave his place of confinement shall secure departmental permission through the chain of command from the Superintendent or Deputy Superintendent of Police. Such request must be secured prior to the employee actually leaving his place of confinement."

Bruno testified that he was unaware of the amendment promulgated on October 25, 1978.

[1] The Court of Appeal erred in affirming the Commission on the basis of Bruno's violation of a regulation of which Bruno was not notified in his letter of termination. See *Department of Public Safety v. Rigsby*, 401, So.2d 1017 (La.App. 1 Cir.1981), writ denied, 406 So.2d 626.

[2,3] Review of the Commission's decision extends to both the law and the facts. LSA-Const.1974, Art. X, § 12. The Commission's findings of fact should be given the same deferences as those made by a judge or jury. *Walters v. Dept. of Police of New Orleans*, 454 So2d 106 (La.,1984). Thus, the standard of review does not differ from that in other civil cases, and the Commission's determination should be affirmed unless it is manifestly erroneous or clearly wrong. *Arceneaux v. Dominque*, 365 So.2d 1330 (La.,1978).

The question is whether Bruno was validly discharged for violating ASOP 75.2. While this regulation was not enacted until November 4, 1979, while Bruno was on sick leave, Bruno stated that he was aware of ASOP 75.2.

At the Civil Service Commission hearing, Bruno essentially admitted that he did not work from October 21, 1979, until his discharge on March 14, 1980. His initial complaint on October 21 was an ear infection. This diagnosis remained on record through November 28. On November 29, the diagnosis became prostate gland trouble and this illness is reflected on the Police Department's records until February 12, 1980, the last day Bruno is shown on sick leave. However, Bruno testified he also had a congenital "heart seizure problem" (Tr. 40).

Bruno admitted most of the activities enumerated in

the letter of termination, to-wit: he went to Detroit on business around November 24, 1979; acted as a judge for a talent contest in Metairie on December 13, 1979; gave an interview at the WWL-TV studio on December 28, 1979; failed to meet an appointment with Sergeant Thompson on January 6, 1980; met the City's Chief Administrative Officer, Reynard J. Rochon, at the Warwick Hotel on January 12, 1980; gave an interview to Sally Ann Roberts of WWL-TV on January 16, 1980; addressed the Krewe of Endymion at the Fountain Bay Hotel on January 22, 1980; attended a fund raiser for President Carter at the Hilton Hotel on Jarnuary 31, 1980; attended a PANO meeting on February 5, 1980; and gave an interview at the WDSU studio on February 29, 1980. Bruno also admitted a trip to New York on union business in March and periodic visits to Florida for union business and relaxation. He also went to Detroit, Philadelphia, and Cincinnati, Ohio, the last trip being on March 14, the date he was terminated. According to Bruno, he was not mentally or physically capable of doing street duty with a gun during the period that he was absent from work.

Bruno initially listed his place of confinement as "35 North Clareoning Avenue, Margate, New Jersey, outside Philadelphia" (Tr.108). On November 11, 1979, his place of confinement was changed to a New Orleans address, 1721 Abadie Avenue. On January 6, 1980, Bruno's place of confinement became 237 Penfold Street, Harahan.

According to Sergeant Liniel W. Thompson, who was assigned to the Urban Squad and worked as Bruno's supervisor, Bruno did not report for an interview on January 6 at 10:30 P.M. and could not be reached by telephone. Subsequently, on January 8, Bruno told Thomp-

son he had not reported to make a statement on the advice of his psychiatrist. Bruno testified that there was merely a misunderstanding about the appointment.

On January 20, 1980, Bruno requested Lieutenant Rinial Martin to place him on furlough instead of sick leave status. Martin advised that this would require Bruno to report to work. Bruno also called Deputy Chief David Kent about changing his sick leave status. Kent said he would not entertain an application for a furlough until Bruno returned to work because Bruno had abused his sick leave. Reynard J. Rochon testified that Bruno asked him to intercede and get him placed on retroactive annual leave. Bruno denied this. On February 1, 1980, Bruno's status was changed to "annual leave—sick" (Tr. 81). Bruno was changed from sick leave to annual leave status because he had run out of sick leave.

Bruno was called in to give a statement on March 7 because he was not at home when policemen checked his house on November 30 and an investigation had been initiated. After a hearing, Superintendent of Police Parsons orderd that Bruno be taken for a physical examination. Bruno was examined by a physician at the Tulane Medical Center and pronounced fit for duty. Parsons then ordered Bruno to return to work. When he did not report the following Monday, March 10, Lieutenant Martin told Bruno he was ordering him back to work. Bruno advised that he had been taken to the hospital and Martin did not insist that Bruno report. Bruno had appeared on a radio talk show earlier that day. Lieutenant Martin was previously unaware that Bruno had any type of heart problem.

Sergeant Martin Coker testified that the practice of

had been to require personnel on sick leave to be confined unless absent for a medical reason. When Sergeant Coker had been on sick leave with a broken shoulder, he received special permission to leave his home after his doctor issued a letter which was approved by the Deputy Superintendent.

Dr. Harry H. Philbert, a specialist in family practice who operates the New Orleans Pain Clinic, testified that he had treated Bruno and was familiar with his medical situation. He first saw the patient on March 28, 1978, and has seen him periodically since that time. Bruno suffers from recurrent attacks of paroxysmal tachycardia, or rapid heart beats, which Dr. Philibert treated with medication.[7] On March 10, 1980, Dr. Philibert examined Bruno. Although his EKG showed a normal sinus rhythm, i.e. his heart was beating normally, an exercise test produced the onset of paroxysmal tachycardia. Medication was prescribed. According to Dr. Philibert, "Bruno...can't play cops and robbers, I just don't think he can tolerate that stress." (Tr. 323) He can perform limited duty but his condition is potentially "lethal" (Tr. 323). According to Dr. Philibert, it would be easy for another physician in a routine examination to be unable to diagnosis Bruno's paroxysmal tachycardia because of the unpredictability of the condition.

James C. Parsons, Superintendent of the New Orleans Police Department, testified that he held a disciplinary hearing concerning Bruno on March 7, 1980, in regard to allegations that Bruno was violating the rules

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[7] Bruno said he had received a medical discharge from the military on April 17, 1967, because of this condition.

regarding sick leave. After Parsons ordered Bruno to go back to work, he was advised on March 10, 1980, that Bruno had not returned to work because of a heart seizure.[8]

Policeman Hubert J. Badeaux drove with Bruno to the radio talk show interview on March 10. During a subsequent lunch, Bruno received a call on his beeper, went to the phone and told Bedeaux he had been ordered back to duty. Bruno then said he was going to his physician. According to Badeaux, Bruno had reported his absence from home to the police department on several occasions when Badeaux was with him.

Bruno said he had always called in when he left his residence and that this was regarded as compliance with the rule, but some of his testimony was evasive. According to Bruno, he was following his doctors' orders and the department's procedures and was never advised that he was in violation of the regulations. Although he was willing to perform his duties in a limited capacity, he was not permitted to do so and was told that anxiety or stress would bring on his tachycardia problem. Bruno said his heart seizure on March 8 was documented at East Jefferson Hospital and tht he had another seizure on March 10. The Urban Squad patrolled the projects, very high crime rate areas, and he was unable to perform that duty. According to Bruno, Sergeant Liniel Thompson advised him on December 7, 1979, that his absences would be all right as long as he called and let someone know where he would be.

Captain Richard B. Martin, a twenty-two year veteran of the Police Department, testified that he was familiar with the sick leave regulations. He confirmed

[8] Dr. Philibert's testimony establishes justification for Bruno's refusal to obey Parson's order to return to work.

Bruno's testimony that when someone called to say he was leaving his residence, a notation would be made on a slip of paper which was discarded when the caller returned home.

In a statement given to Sergeant Thompson on December 7, 1979, Bruno admitted to being familiar with New Orleans Police Department ASOP 75.2, supra. (Joint Exhibit, No. 2) In regard to his alleged misconduct on November 30 in not being home, Bruno said he had visited two doctors and his druggist. He twice received a busy signal when he attempted to notify the Urban Squad office and had then called the Health Services Section.

Bruno argues that there was no legal cause for his termination; that discharge is too severe a penalty for violation of the sick leave regulations; that the regulations restricting those on sick leave to a place of confinement violate fundamental contitutional rights; and that the regulation in question was enforced against him in a discriminatory manner.

[4] The record leaves some question about whether Bruno reported absences from his place of confinement. However, the Commission was not clearly wrong in finding that the Department carried its burden of proving that Bruno was not reporting those absences. There is no question, as the Commission found, that all of Bruno's absences from his place of confinement were not for the specified purposes allowed by the sick leave regulation.

In view of the period of time involved and the flagrant nature of Bruno's violations, termination cannot be classified as too severe a penalty. It is clear that his misconduct must have had a real and substantial relation-

ship to the efficient operation of the service. *Newman v. Department of Fire*, 425 So.2d 753 (La.,1983).

The constitutionality of the provision restricting those on sick leave to confinement present a serious question. The Seventh Circuit Federal Court of Appeals held in *Pienta v. Village of Schaumburg, Ill.*, 710 F.2d 1258 (1983) that a similar provision infringed on the fundamental constitutional rights to vote, attend church, go to court, attend political or family gatherings and travel. *Pienta* concluded that such a stringent regulation could only be justified by a compellling state interest. The Police Department's interests in avoiding abuse of sick leave, protecting the public fisc, effiecientiy allocating man power, requring those on leave to stay by the phone in case they are needed, and maintaining the morale of those serving did not suffice, because they could be achieved without such a blanket restriction on freedom of movement. On rehearing, the majority of the Court of Appeal analyzed the applicability of *Pienta* to this situation and concluded that its strict scrutiny analysis was not appropriate. Such rules are not per se arbitrary and irrational and can be unforced unless, as applied, they unreasonably restrict constitutional rights. See *Cacace v. Seniuk*, 104 Misc.2d 560, 428 N.Y. S.2d 8 19 (1980).

The *Pienta* plaintiffs sought a declaration judgment and an injunction against enforcement of the confinement regulations. Bruno, however, did not challenge this regulation until his discharge was under consideration in the Court of Appeal. His only complaints concerning constitutionality are made now retroactively, and there is no showing of a deprivation of rights. In considering his good faith as an employee, it is significant that Bruno did not attempt

compliance with the Department's regulation for extended sick leave. D.R. 630-3, paragraph 9, as amended on October 25, 1978. See Footnote 6, supra.[9]

Although Bruno was advised by his physician that he could undertake certain outside activities, he never atttempted to obtain departmental permission for those endeavors. Had Bruno unsuccessfully sought permission for appropriate activity during his rehabilitation, he could then legitimately raise the constitutional issue of the overbreadth of ASOP 75.2. See *Loughran v. Codd*, 432 F.Supp. 259 (1976). Bruno chose, instead, to completly disregard the regulations of the Police Department even after he had been advised that his conduct was under investigation.

It is suspicious that Bruno's hear condition did not surface until he was actually ordered to return to work. While there was testimony that ouside activities which

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[9] After a revision on November 4, 1979, the extended sick leave provision was as follows:

"ASOP 75.12: EXTENDED SICK LEAVE—Members on extended sick leave for illness or injury (including IOD) may arrange for advance approval for activities related to continued treatment, convalescence and rehabilitation in the following manner, so that notification is not necessary:

"a. written request must be made to the respective Bureau Chief, via the Chain of Command. Basis for this request must be clearly statd and must be accompanied with a letter from the individual's attending physician, stating the necessity for his request and an approximate duration of treatment, convalescence or rehabilitation.

"b. The Commanding Officer of the individual making the request must review this request recommending approval or dissaproval, and forward same to the respective Bureau Chief.

"c. All approvals will be for a maximum of 14 days (unless waived by the Bureau Chief). At the end of each 14 day period, the case shall be re-evaluated by the individual's Commanding Officer and submitted to the Bureau Chief before any extension is granted for the additional time."

were not stressful were compatible with that condition, there was no evidence those activities were compatible with the stated reasons for his sick leave, to-wit: an ear infection and prostate trouble.

There is no evidence that Bruno was single out for disciplinary action on a discriminatory basis.

While the regulation may present serious constitutional problems in other contexts, Bruno's flagrant violations over a period of almost five months were prejudicial to the conduct of the New Orleans Police Departmment and justified his discharge. As applied to Bruno, the regulation did not arbitrarily or unreasonably restrict his constitutional rights.

For the foregoing reasons, the judgment of the Court of Appeal is affirmed.

AFFIRMED

MARCUS, J., dissents.

CALOGERO, J., dissents. Dismissal of relator from this Department is a patently excessive disciplinary penalty, in my opinion.

APPENDIX E

IN THE SUPREME COURT OF THE
STATE OF LOUISIANA

VINCENT J. BRUNO, Appellant
VS
NEW ORLEANS DEPARTMENT OF
POLICE, Appellee

CIVIL NO 84-C-1294

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Vincent J. Bruno, the appellant above named, hereby appeals to the Supreme Court of the United States, from the final judgement of the Louisiana Supreme Court affirming the decision of the lower courts and dismissing appellant's cause of action, entered on the 21st day of February, 1985.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

John B. Levy
Attorney for Vincent J. Bruno,
Appellant
725 Girod Street
New Orleans, La. 70130

APPENDIX F

SUPREME COURT OF THE UNITED STATES
NO._____

VINCENT J. BRUNO VS. DEPARTMENT OF POLICE

The Clerk will enter my appearance as Counsel of Record for Appellant, Vincent J. Bruno who in this Court is Appellant.

I certify that I am a member of the Bar of the Supreme Court of the United States:

Michael F. Barry
1005 Maison Blanche Bldg.
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New Orleans, Louisiana 70112
Telephone: (504) 523-3957

APPENDIX G

No. 84 C 1294
SUPREME COURT
—OF THE—
STATE OF LOUISIANA

Clerk's Office
SUPREME COURT OF
LOUISIANA
Filed JAN 28, 1985

VINCENT J. BRUNO
VERSUS
DEPARTMENT OF POLICE

In Re: Vincent J. Bruno
Applying for: REHEARING
Parish of: Orleans Parish Civil Service, State of Louisiana

John Levy
Attorneys for Applicant.

Salvador Anzelmo, City Attorney,
Bruce E. Naccari, Assistant City Attorney
Bernette J. Johnson, Deputy City Attorney
Attorneys for Respondents

Supreme Court, U.S.
FILED
(3)
AUG 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 84-1891

In the Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT J. BRUNO

Appellant,

VERSUS

NEW ORLEANS DEPARTMENT OF POLICE

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA FOR THE CITY OF NEW ORLEANS

MOTION TO AFFIRM

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QUESTIONS PRESENTED

Whether appellant's jurisdictional statement manifests any complaint substantial enough to warrant Supreme Court jurisdiction or whether the questions on which the decision of the cause depends are so unsubstantial as not to merit further argument.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

VINCENT J. BRUNO

Appellant,

VERSUS

NEW ORLEANS DEPARTMENT OF POLICE

Appellee.

MOTION TO AFFIRM

I.
OPINIONS BELOW

Appeal was taken from an order of City Civil Service Commission affirming dismissal of officer Vincent J. Bruno from the New Orleans Police Department for having violated departmental regulations governing conduct of police while on sick leave. The Court of Appeal affirmed, and appeal was taken. The Supreme Court of Louisiana, 462 So. 2d 139 (1985) held that (1) the Court of Appeal erred in affirming the commission on the basis of officer's violation of regulation of which he was not notified in his letter of termination and (2) officer's flagrant violations of regulations pertaining to sick leave justified his discharge and (3) as applied to officer, regulation ASOP 75.0 paragraph 2 did not unreasonably restrict his constitutional rights.

II.
STATEMENT OF THE CASE

Police officer Vincent Bruno, because of an alleged

ear infection, was on sick leave from the New Orleans Police Department from October 21, 1979, until February 1, 1980, on which last date, having exhaused accured sick leave, he was placed on "annual-sick."

The record discloses that Mr. Bruno used his sick-leave time to conduct the business of a local police union, of which he was president. Far from attempting to maintain the slightest pretense of illness or disability, Mr. Bruno traveled extensively and made frequent public appearances, thus flagrantly violating the regulations of the appointing authority and willfully refusing to discharge the duties of his employment. His breaches of discipline include but were not limited to the following egregious examples:

> On October 21, 1979 when Mr. Bruno first was placed on sick leave, he stated his place of confinement as Norgate, New Jersey. The next day he changed his place of confinement to another New Jersey city without departmental notice or permission.
>
> On November 24, 1979, he began a series of extensive travels to Detroit, Washington, and Miami in the vigorous pursuit of union business, again changing his place of confinement without notice or approval.
>
> On December 13, 1979, and January 16, 1980, while still on sick leave with his allegedly disabling ear infection, Bruno made two public appearances for the broadcast media.

On January 22, 1980, Bruno attended and addressed a gathering of the Krewe of Endymion at a mid-city hotel. On January 31, he absented himself from his place of sick-confinement to attend fund-raising festivities for President Carter at a downtown hotel.

On January 23, while on sick leave, and on February 5, while on annual sick-leave, Bruno attended union meetings.

Further, while on annual sick-leave, Bruno gave the following flagrant demonstrations of health and non-disability: travel to New York and Philadelphia for union business sometime in early March and appearing on yet another radio broadcast on March 10.

While he was on sick leave, on January 12, 1980, Bruno was warned by the City's Chief Administrative Officer of the impropriety of his public abuse of sick leave privileges. A further warning was given by Deputy Chief of Police David Kent on January 20. Reference to some of the dates cited above reveals that the warnings were conspicuously ignored.

On March 7, 1980, Bruno told the Internal Affairs Division of NOPD that he did not recall ever having heard of or gotten permission for any of his travels or appearances while on sick leave. None of his ranking officers, at the hearing below, could recall or find any record of any such notice or permission.

At the same interview with IAD on March 7, 1980, Bruno attempted to convince the City *for the first time,* that his need for sick-leave was created, not by the ear

infection originally claimed, but by an alleged heart condition. Pursuant to police regulations, he was ordered to present himself for an examination by Tulane Medical Center physicians. These doctors found Bruno fit to discharge his duties.

Since Bruno had been found fit for duty, the Chief ordered him off sick leave or annual sick-leave and back to work. Bruno refused, still claiming disability. Three days later, the "ailing" Bruno was back on his former "convalescent" regime, appearing on yet another radio talk show.

On March 14, 1980, by letter of the Chief of Police, Bruno's employment was terminated. The conduct described above was found to violate ASOP 75.0 paragraph 2, governing confinement to one's residence or other *approved* place of confinement of one on sick leave; Rule 4, paragraph 2, requiring adherence to instructions from an authoritative source; and other regulations, including Rule IX, Section 111 of the Rules of the Civil Service Commission.

Mr. Bruno appealed his dismissal to the New Orleans Civil Service Commission. Thorough hearings were held over the three days of May 14, June 17, and June 19, 1980. The Commission upheld the dismissal. The Commission specifically found that "the City carried its burden of proving that Mr. Bruno was not *reporting* absences from his place of confinement." The Commission further found that his admitted absences while on sick leave were not of the sort permitted by sick leave rules. Most importantly, the Commission implicitly found that the evidence in the record tended strongly to show that Mr. Bruno was fit at the time he disobeyed the lawful order of the Chief of Police

that he return to active duty. This disobedience, the Commission implied, would warrent dismissal even if the City had not proven the separate charges of earlier sick-leave confinement rules' violations.

III.
SUBSTANTIALITY OF THE QUESTIONS PRESENTED

It is appellant's claim that Regulation ASOP 75, paragraph 2 of the New Orleans Police Department curtails plaintiff's constitutional rights to equal protection, to travel, to vote, to attend a church of his choice and to due process.

ASOP 75, paragraph 2 provides:

> A sick leave period commences at the time the member notifies the Desk Officer. A member on sick leave shall remain in his residence or other approved place of Confinement for the entire sick leave period, except to visit a physician, hospital, clinic, purchase meals or purchase medicine. The Member shall notify his Unit of Assignment before leaving and upon returning from such a visit.

On its face the regulation would appear to limit appellant's free exercise of his constitutional rights. However, under a rational relationship test the regulations are sufficiently related to legitimate goals of sufficient staffing, reduction of cost of police force, efficiency and others.

Rule 16 of the Rules of the Supreme Court of the United States provides in part:

> (c) The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.
>
> (c) The court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

It is appellee's contention that the questions involved on which the decision of the case depends are so unsubstantial as not to need or merit further argument. It is a jurisdictional prerequisite to Supreme Court review of state court judgments that the federal question raised by the appeal be "substantial". *Zucht v. King* (1922) 260 U.S. 174, 43 S.Ct. 24, 67 L. Ed. 194. *Tidal Oil Co. v. Flanagan* (1924) 263 U.S. 444, 44 S.Ct. 197, 68 L. Ed. 382.

Appellee admits that rights secured appellant by the Bill of Rights are worthy of special protection. However, the Supreme Court has indicated that in certain areas a state has an interest as an employer which differs significantly from its interests in regulating the citizenry, in general, and that when a state acts as an employer the courts should evaluate those actions under a more deferential standard that strict scrutiny. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois,* 391 U.S. 563, 88 S. Ct. 1731, 20L. Ed. 2d 811 (1968).

Two courts which reviewed the constitutionality of New York City Police Department regulations in suits similar to this one held that the rational relationship test applied. See *Gisi v. Codd,* 391 F. Supp. 1333 (E.D.N.Y. 1974) and *Loughram v. Codd,* 432 F. Supp. 259 (E.D.N.Y. 1978). The regulations violated by appellant are a constitutionally permissable means rationally devised to achieve the compelling public interest in an efficient and ever-ready police force.

However, these Constitutional questions have received adequate airing in both the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court. Appellant relies in the main on *Pienta v. Village of Schaunburg, Ill.,* 710 F. 2d 1258 (1983) which held that a provision similar to ASOP 75, paragraph 3 violated certain fundamental rights. On rehearing, the majority in the Court of Appeal analyzed the applicability of *Pienta* to this situation and concluded that its strict scrutiny analysis was not appropriate. The Supreme Court felt that such rules are not per se arbitrary and irrational and can be enforced unless, as applied, they unreasonably restrict constitutional rights. The court concluded:

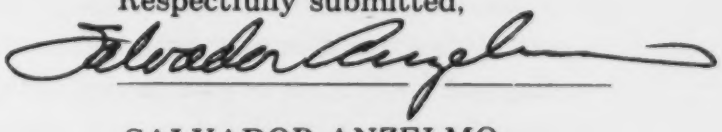
> While the regulation may present serious constitutional problems in other contexts, Bruno's flagrant violations over a period of almost five months were prejudicial to the conduct of the New Orleans Police Department and justified his discharge. As applied to Bruno, the regulation did not arbitrarily or unreasonably restrict his constitutional rights.

Bruno v. Department of Police, 462 So.2d 139 (La. App. 4th CIr. 1985)

IV.
CONCLUSION

Notwithstanding appellant's claim that he occupies the position of the Grinch That Stole Christmas as a result of the police strike he called that cancelled Mardi Gras, no showing of discrimination or violation of equal protection has been made. The record indicates that appellant was free to enjoy the rights guaranteed him under the constitution, and that, while supposedly ill, he was able to enjoy the freedoms of travel and speech. ASOP 75.0 paragraph 2 is not designed to restrict enjoyment of those rights but rather to ensure that order, discipline and morale are maintained within the Police Department of New Orleans. Those goals are rationally related to the means sought to obtain them and appellant's discharge in furtherance of those goals was not irrational or arbitrary. In fact appellant's constitutional claims appear to be an afterthought, a means by which he can prolong litigation already adequately settled at the state level. Appellant's claim is too insubstantial to merit review before the Supreme Court. Accordingly the judgement of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,



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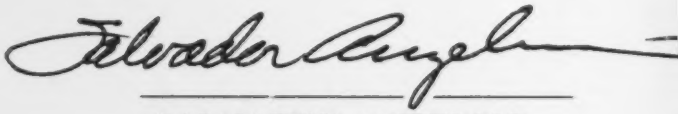
CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Motion to Affirm have been served on counsel for all parties by depositing same in the United States Mails, postage prepaid and properly addressed, this 23rd day of August, 1985.



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